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No.

In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), this Court held that the Due Process Clause permitted a State to exercise personal jurisdiction over nonresident defendants in a case involving an alleged intentional tort because the defendants' actions were "expressly aimed at" the forum State. In finding that standard satisfied, the Court observed that the defendants knew that the plaintiff resided in the forum State and that the publication containing the allegedly libelous statements had "its largest circulation" in that State. *Id.* at 790.

The lower courts have divided sharply in applying *Calder* in the context of intentional torts alleged to have been committed over the Internet. Some courts hold that the defendant's knowledge that the plaintiff resides in the forum State is sufficient to satisfy due process, while other courts hold that the plaintiff must adduce other facts—akin to the circulation of the publication in *Calder*—that establish a link between the defendant and the forum State. The question presented is:

Whether the Due Process Clause permits a State to exercise personal jurisdiction over a nonresident defendant based solely on a claim that the defendant committed an intentional tort on the Internet knowing that the plaintiff resided in the forum State.

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TABLE OF AUTHORITIES

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CASES

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Burleson v. *Toback*, 391 F. Supp. 2d 401 (M.D.N.C. 2005) 17

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Calder v. *Jones*, 465 U.S. 783 (1984) ..... passim

Callaway Golf Corp. v. *Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194 (C.D. Cal. 2000) 16

TABLE OF AUTHORITIES—continued

Page(s)

Copperfield v. *Cogedipresse*, 26 Media L. Rep.(BNA) 1185 (C.D. Cal. 1997) 16

D'Onofrio v. *Il Mattino*, 430 F. Supp. 2d 431 (E.D. Pa. 2006) 17

Dailey v. *Popma*, 191 N.C. App. 64 (N.C. Ct. App. 2008) 17

Dedvukaj v. *Maloney*, 447 F. Supp. 2d 813 (E.D. Mich. 2006) 17

EDIAS Software Int'l v. *Basis Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996) 16

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Goldhaber v. *Kohlenberg*, 928 A.2d 948 (N.J. Super. Ct. App. Div. 2007) 17

Gorman v. *Jacobs*, 597 F. Supp. 2d 541 (E.D. Pa. 2009) 17

Griffis v. *Luban*, 646 N.W.2d 527 (Minn. 2002) 13, 14

Hammer v. *Trendl*, 2003 U.S. Dist. LEXIS 623 (E.D.N.Y. Jan. 18, 2003) 17

Hibdon v. *Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005) 17

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Jackson v. *California Newspaper Partnerships*, 406 F. Supp. 2d 893
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Kulko v. *Superior Court of California*,
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Marks v. *Alfa Grp.*,
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Marten v. *Godwin*,
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TABLE OF AUTHORITIES—continued

Page(s)

Medinah Mining, Inc. v. *Amunategui*,
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Monarch Health Scis., Inc. v. *Amazon Thunder, Inc.*, 2007 WL 3549434
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Nam Tai Elec's, Inc. v. *Titzer*,
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Naxos Resources (U.S.A.) Ltd. v. *Southam Inc.*,
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Novak v. *Benn*,
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Nw. Healthcare Alliance v. *Healthgrades.com*,
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Oasis Corp. v. *Judd*,
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Ouazzani-Chahdi v. *Greensboro News & Record, Inc.*,
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Realuyo v. *Villa Abrille*,
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Renaissance Health Publ'g, LLC v. *Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. Dist.
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Revell v. *Lidov*,
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Schnapp v. *McBride*,
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Silver v. *Brown*,
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Software Dev. & Inv. of Nevada v. *Wall*,
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Winfield Collection, Ltd. v. *McCauley*,
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Ohio Rev. Code Ann. § 2307.382..... 6

TABLE OF AUTHORITIES—continued

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OTHER AUTHORITIES

Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 Nw. U. L. Rev. 473, 473-474 (2004) 20

Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into* International Shoe, 8 Seton Hall Const. L.J. 763 (1998) 21

The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html 18

Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"?: It's Time for the Supreme Court To Straighten Out the Personal Jurisdiction Standard Once Again*, 54 Cath. U. L. Rev. 53 (2004) 21

Brian E. Daughdrill, *Personal Jurisdiction and the Internet: Waiting for the Other Shoe to Drop on First Amendment Concerns*, 51 Mercer L. Rev. 919 (2000) 20, 21

C. Douglas Floyd & Shima Baradaran-Robinson, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind. L.J. 601 (2006) 21

TABLE OF AUTHORITIES—continued

Page(s)

Michael A. Geist, *Is There a There There?: Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345 (2001) 21

Daniel V. Logue, Note, *If the International Shoe Fits, Wear It: Applying Traditional Personal Jurisdiction Analysis to Cyberspace in* Compuserve, Inc. *v.* Patterson, 42 Vill. L. Rev. 1213 (1997) 21

Arthur R. Miller, *The Emerging Law of the Internet*, 38 Ga. L. Rev. 991 (2004)..... 20

Titi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 Berkeley Tech. L.J. 519 (2004) 21

Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821(2003)..... 19

Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 Nw. U. L. Rev. 455, (2004)..... 20

Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951 (2005).... 21

Susan Stellin, *Hoteliers Look to Shield Themselves from Dishonest Reviews*, N.Y. Times, Oct. 25, 2010, *available at* http://www.nytimes.com/2010/10/26/business/26hotels.html 18

TABLE OF AUTHORITIES—continued

Page(s)

Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Trend-Data/Online-Activites-Total.aspx 18

Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147 (2005) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott Roberts respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., *infra*, 1a-32a) is reported at 126 Ohio St. 3d 81 (Ohio 2010). The opinion of the Court of Appeals of Ohio (App., *infra*, 33a-49a) and the trial court's order (App., *infra*, 50a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 10, 2010. On August 12, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to November 7, 2010 (a Sunday). This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2.

STATEMENT

There is a clear, deep, and persistent conflict among the lower courts regarding the due process standard governing the exercise of personal jurisdiction over a nonresident defendant alleged to have committed an intentional tort using the Internet. The issue arises often in both state and federal courts, and Americans' increasing use of the Internet to express their views on products, services, and current events means that courts will be required to confront the question even more frequently. Under the erroneous standard adopted by the court below, moreover, individuals may be forced to appear in distant courts simply because they posted on the Internet a statement alleged to be defamatory, knowing that the plaintiff lived in the forum State. That expansive rule is inconsistent with this Court's precedents—which require more contacts between defendant and forum—and, if permitted to stand, could chill the individual expression that the Internet enables. Review by this Court is clearly warranted.

A. Due Process Limits On Personal Jurisdiction

The Due Process Clause limits a court's exercise of personal jurisdiction over a nonresident defendant to situations in which the defendant has "minimum contacts" with the forum State. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The minimum contacts requirement "perform[s] two * * * functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States * * * do not reach out beyond the limits imposed on them by their status as coequal sovereigns." *World-Wide Volks-*

wagen Corp. v. *Woodson*, 444 U.S. 286, 291-292 (1980).

The first interest rests on this Court's longstanding injunction that "the maintenance of [a] suit [must] not offend 'traditional notions of fair play.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)). Courts may not "enter judgments affecting * * * nonresident defendants" unless it is "fair" to require those individuals to litigate in the forum. *Kulko* v. *Superior Court of California*, 436 U.S. 84, 91 (1978).

This fairness inquiry generally focuses on the burden on a defendant of having to litigate away from home, see *International Shoe*, 326 U.S. at 317, and the extent of the defendant's participation in the State's market, see *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475-476 (1985). The inquiry also looks to whether the defendant had "fair notice" that he or she would be liable to suit in the forum State. See *id.* at 487.

The "minimum contacts" standard also ensures that no State may exercise unlimited power to reach individuals residing beyond its borders. See, *e.g.*, *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (observing that "the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States").

Questions regarding the due process limits on personal jurisdiction often arise in the context of intentional tort claims. The Court held in *Calder* v. *Jones*, 465 U.S. 783, 789 (1984), that the minimum contacts requirement was satisfied with respect to a

libel claim because the defendants had "expressly aimed" their conduct at the forum State. *Calder* involved a California court's exercise of jurisdiction over a nonresident who had authored a magazine article about a California celebrity. *Id.* at 784-786. This Court relied on three facts in upholding jurisdiction: (1) the defendants knew that the article would harm the plaintiff; (2) the defendants knew that "the brunt of that injury would be felt" in California; and (3) the magazine had its largest circulation in California, see *id.* at 789-790.

In subsequent decisions, the Court has emphasized the importance of the third factor—the extent of participation in the State's market. See *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 779, 774 (1984) (defendant "chose to enter the New Hampshire market" by circulating "thousands of magazines" there each month); see also *Burger King*, 471 U.S. at 473 (stating the principle that "a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story").

The question in this case is how the "minimum contacts" standard as elucidated in *Calder* and subsequent decisions applies to claims of intentionally tortious conduct involving the Internet.

B. Factual Background

In February 2006, petitioner Scott Roberts, a Virginia resident, purchased an MR-1 Pontiac engine block from respondent Kauffman Racing Equipment, L.L.C., an Ohio-based company that builds automotive equipment and sells it to the public "nationwide." App., *infra*, 2a. Roberts purchased the engine block after viewing it on respondent's website. App.,

infra, 2a. Roberts did not travel to Ohio; indeed, he has never been to that State. App., *infra*, 2a.

Eight months later, Roberts telephoned respondent to complain that the engine block was defective. App., *infra*, 2a. Respondent offered to inspect the block and agreed that, if it was defective, respondent would buy it back at the original transaction price. After inspecting the block, however, respondent found that it had been modified post sale. App., *infra*, 2a-3a. When Roberts acknowledged the modifications, respondent refused to buy back the engine block and instead returned it to Roberts. App., *infra*, 3a.

Over the next month and a half, Roberts expressed his frustration at respondent's actions by posting comments criticizing respondent on several websites related to automotive-racing equipment. App., *infra*, 3a. Roberts stated that the engine block was "useless" as delivered, App., *infra*, 3a (original capitalization omitted); full of "defects," App., *infra*, 4a (original boldface omitted); and that Roberts had done "nothing [to] cause[]" those defects, App., *infra*, 4a. He stated that respondent had claimed that "[the engine block is] the best aftermarket block out there for a Pontiac, but I now know better.* * * Basically this block is junk * * *. Also the service you would get from [respondent] is less than honorable." App., *infra*, 4a-5a.[1]

Roberts stated that his goal in posting the comments was "to help other potential victims" by tell-

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[1] The comments were displayed in the public forum sections of automotive-racing websites and, in one instance, in an item description on eBay Motors, an online auction service. App., *infra*, 3a.

ing his "story" and "getting the [facts] out to more people," App., *infra*, 4a-5a. He also stated that "[w]hat I lo[]se in dollars I will make up in entertainment at [respondent's] expen[s]e." App., *infra*, 4a. Roberts emphasized that he "posted facts I can back up 100%." App., *infra*, 5a.

C. Proceedings Below

1. Respondent commenced this action in the Knox County Court of Common Pleas, seeking damages for defamation and intentional interference with contracts and business relationships. App., *infra*, 5a-6a. The trial court granted Roberts's motion to dismiss the complaint for lack of personal jurisdiction. App., *infra*, 6a, 50a.

2. The court of appeals reversed by a divided vote, holding that asserting personal jurisdiction over Roberts did not violate the Due Process Clause. App., *infra*, 33a-49a.[2] The majority stated that a finding of "purposeful availment" is required to permit the assertion of personal jurisdiction; this requirement "ensures a party will only be haled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state." App., *infra*, 41a.

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[2] The court of appeals also held that the exercise of personal jurisdiction over petitioner was permissible under the Ohio long-arm statute. App., *infra*, 37a-40a. The Ohio Supreme Court affirmed that determination (App., *infra*, 1a-13a). The long-arm statute (Ohio Rev. Code Ann. § 2307.382) "is not coterminous with due process;" even though "Ohio's long-arm statute confers personal jurisdiction over Roberts, an Ohio court cannot exercise personal jurisdiction over Roberts if doing so would violate his constitutional right to due process." App., *infra*, 13a.

The court of appeals observed that "advances in technology" require courts "to tackle unique situations such as the one presented in the instant action." App., *infra*, 41a. Noting that "[t]he Internet has * * * become accessible at virtually every coffee shop in the world," the majority concluded that a "non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state." App., *infra*, 43a-44a. Because respondent's injury was suffered in Ohio, Roberts was subject to personal jurisdiction "based upon the 'effects' of his Virginia conduct in Ohio." App., *infra*, 44a.

The dissenting judge observed that "Roberts' posting[s] were accessible around the world and there is no evidence or allegation that Roberts directly targeted, solicited, or interacted with Ohio residents via the [online] bulletin board." App., *infra*, 47a. "Even assuming Roberts knew the postings could be accessible and read by Ohio residents; this is insufficient contact" to constitute the purposeful availment required for personal jurisdiction. App., *infra*, 47a.

3. The Supreme Court of Ohio affirmed by a divided vote. App., *infra*, 1a-32a. The majority pointed to *Calder*'s discussion of the assertion of personal jurisdiction over the author and editor of an allegedly libelous article, quoting this Court's observation that those individuals

> "knew [that the article] would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the

> National Enquirer has its largest circulation."

App., *infra*, 17a (quoting *Calder*, 465 U.S. at 789-790).

Relying principally on this Court's decision in *Calder*, the majority held that because Roberts intended to harm respondent and knew that respondent was located in Ohio, the requirements of due process were satisfied. App., *infra*, 18a-20a, 26a. The court also observed that respondent had shown that five Ohio residents had read Roberts's posts, and that harm therefore had occurred in Ohio. App., *infra*, 22a.

Two justices dissented. App., *infra*, 27a-32a (O'Donnell, J., dissenting). They first pointed out that the majority's reference to "the fact that Roberts could foresee and even intended to cause injury to [respondent], an Ohio company," was insufficient to satisfy due process: "the United States Supreme Court 'has consistently held that this kind of foreseeability is not a "sufficient benchmark" for exercising personal jurisdiction.'" App., *infra*, 27a-28a (quoting *Burger King*, 471 U.S. at 474).

The dissenting justices next explained that the majority's analysis was inconsistent with this Court's decision in *Calder*:

> [T]he court in *Calder* considered the location of the injury and the *pervasive nature of the contact* when assessing whether the defendants had the minimum contacts with the forum state. The court stressed that the newspaper in which the article appeared, the National Enquirer, had its largest circulation, almost twice that in any other state, in Cali-

> fornia, where the plaintiff resided. It was that detail *coupled with* the fact that the person about whom the article was written lived and would suffer injury in California that rendered California the focal point of the publication.

App., *infra*, 29a (emphasis in original).

Here, by contrast, Roberts "posted his comments on * * * websites [with no] specific connection to Ohio," and none of these sites was "more likely to be viewed by a resident of Ohio than by a resident of any other state." App., *infra*, 29a. The fact that five Ohio residents viewed the comments "is not at all comparable" to the National Enquirer's sale of "600,000 copies of the offending article in the forum state." App., *infra*, 30a, 29a.

"While it is evident from Roberts's Internet posts that he sought to discourage others from purchasing [respondent's] products," the justices said, "any individual who posts a negative review of a product or service in a public forum arguably seeks the same objective. Subjecting all individuals to suit in Ohio who post Internet reviews—no matter how scathing—of purchases made from Ohio companies does not comport with the due process notions of 'fair play and substantial justice.'" App., *infra*, 31a. "[T]he practical impact of the majority's holding in this case is to unnecessarily chill the exercise of free speech." App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The Due Process Clause requires "minimum contacts" between a defendant and a forum State to justify the forum's exercise of personal jurisdiction. The lower courts disagree regarding the application of

this standard in the frequently-recurring situation in which a defendant is alleged to have committed an intentional tort using the Internet. Intervention by this Court is necessary to resolve this clear conflict and provide guidance to the lower courts with respect to this important issue.[3]

A. The Lower Courts Disagree Sharply Regarding The Due Process Standard For Personal Jurisdiction In Internet Intentional Tort Cases.

The lower courts have adopted conflicting standards for analyzing whether a defendant who committed an intentional tort using the Internet may, consistent with due process, be subject to personal jurisdiction in the State in which the plaintiff is located.

The court below and two other courts apply a "knowledge" test, requiring the plaintiff to show only that the defendant engaged in an intentional tort involving the Internet knowing the plaintiff's State of residence.

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[3] The decision below satisfies the finality requirement applicable to review by this Court of the judgments of state courts. *E.g.*, *Calder*, 465 U.S. at 788 n.8 (holding with respect to a due process challenge to personal jurisdiction in the same posture as the present case that "[a]lthough there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' Accordingly, as in several past cases presenting jurisdictional issues in this posture, 'we conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257.'") (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 195-196, n.12, (1977)) (citing *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp.*, *supra*; *Kulko* v. *Superior Court*, *supra*)).

Five courts require a plaintiff to satisfy a "knowledge-plus" standard. Proof that the defendant was aware of the plaintiff's residence when posting allegedly intentionally tortious material on the Internet is not sufficient; the plaintiff must establish additional facts connecting the defendant to the forum. Typically, courts look for facts showing that the website on which the defendant posted his or her comments is one that specifically targeted the forum State.

The majority and dissenting opinions of the court below mirror the two sides of this deep and long-standing conflict among the lower courts. This case accordingly presents an especially appropriate vehicle for resolving the conflict.

1. Five Lower Courts Apply A "Knowledge-Plus" Standard.

The Third, Fourth, Fifth, and Eighth Circuits, as well as the Minnesota Supreme Court, apply a "knowledge-plus" standard in determining whether due process permits the exercise of personal jurisdiction over a defendant alleged to have committed an intentional tort via the Internet.

The Eighth Circuit held in *Johnson* v. *Arden*, 614 F.3d 785 (8th Cir. 2010), that personal jurisdiction is permissible only upon proof that the defendant had knowledge of the plaintiff's forum state residence *together with* additional facts demonstrating that the defendant "intentionally targeted the forum state." *Id.* at 796. A defendant's mere "[p]osting on the internet from Colorado an allegedly defamatory statement including the name 'Missouri' in its factual assertion does not create the type of substantial connection between [the defendant] and Missouri neces-

sary to confer specific personal jurisdiction." *Id.* at 797.

Johnson involved a defamation claim arising out of the defendants' Internet posting of the statement that the plaintiffs had "operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a 'kitten mill' in Unionville, Missouri." *Id.* at 796 (internal quotation marks omitted). Because there was no evidence other than the statement's reference to the plaintiffs' residence "that the * * * website specifically targets Missouri, or that the content of [defendant's] alleged postings specifically target[ed] Missouri," the exercise of personal jurisdiction violated due process. *Ibid.*

The Fourth Circuit reached the same conclusion in *Young* v. *New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). That case concerned defamation suits brought by the warden of a Virginia prison against two Connecticut newspapers that had posted on the Internet articles discussing the prison and the warden. There was no question that the defendants knew of the plaintiff's Virginia residence, but the Fourth Circuit held that due process required more: "The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia *readers*," *id.* at 263 (emphasis added)—by, for example, utilizing a website targeting Virginia—before Virginia could assert jurisdiction over the Connecticut newspapers, see *ibid.*

The Third Circuit also requires more than proof of knowledge of the plaintiff's residence. See, *e.g.*, *IMO Indus.* v. *Kierkert*, 155 F.3d 254, 265 (3d Cir. 1998) ("Simply asserting that the defendant knew that the plaintiff's principal place of business was lo-

cated in the forum would be insufficient in itself to meet [*Calder*]."). Even if "web sites * * * bring about an injury to [the plaintiff] in [the forum State]," the plaintiff still must show that the defendant "engaged in intentionally tortious conduct *expressly aimed at*" the forum State. *Toys "R" Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 455 n.6 (3d Cir. 2003).

The Fifth Circuit similarly embraces a knowledge-plus standard. While recognizing that "[k]nowledge of the particular forum * * * forms an essential part of the *Calder* test," *Revell* v. *Lidov*, 317 F.3d 467, 475 (5th Cir. 2002), the court nonetheless requires additional facts indicating "more direct aim," *id.* at 476, such as express targeting of a forum State audience through choice of website or through the text of the posted statement, *id.* at 474-476 (citing *Young*, 315 F.3d at 258, 263). *Cf. Ouazzani-Chahdi* v. *Greensboro News & Record, Inc.*, 200 Fed. Appx. 289, 293 (5th Cir. 2006) (stating that the defendant's knowledge of plaintiff's forum residence "is insufficient to establish personal jurisdiction under *Calder*").

Finally, the Minnesota Supreme Court—expressly adopting the Third Circuit's approach—applies a knowledge-plus test when evaluating personal jurisdiction in the context of Internet-based intentionally tortious conduct. *Griffis* v. *Luban*, 646 N.W.2d 527, 534-537 (Minn. 2002). "The mere fact that [the defendant] knew that [the plaintiff] resided and worked in [the forum State] is not sufficient to extend personal jurisdiction over [the defendant] in [the forum State], because that knowledge does not demonstrate targeting of [the forum State] as the focal point of the allegedly defamatory statements." *Id.* at 536.

The court in *Griffis* refused to enforce a default judgment entered by an Alabama court. It held that the defendant's knowledge of the plaintiff's Alabama residence was not sufficient to permit the exercise of personal jurisdiction: Because "nothing in the record indicate[d] that the statements were targeted at the state of Alabama or at an Alabama audience beyond [plaintiff] herself," *id.* at 535, the Alabama judgment was rendered by a court without personal jurisdiction and was "not entitled to full faith and credit in Minnesota." *Id.* at 537.

2. *Three Courts Hold That Defendant's Knowledge Of The Plaintiff's Residence Is Sufficient.*

The Seventh Circuit and the New Jersey Supreme Court agree with the court below that the defendant's knowledge of the plaintiff's state of residence is sufficient to establish personal jurisdiction under the Due Process Clause.

The court below rested its holding squarely on the fact that Roberts "knew" of the plaintiff's Ohio residence when posting the allegedly defamatory material to the Internet. App., *infra*, 23a (majority opinion). Jurisdiction was permissible because "Roberts knew that [respondent] was an Ohio company" and, because his target was respondent, he knew that "the brunt of the harm would be suffered in Ohio." App., *infra*, 18a.

Indeed, the dissenting justices below criticized the majority for applying a standard requiring proof only that the defendant knew that the plaintiff was located in Ohio. App., *infra*, 27a-28a, 30a-31a (O'Donnell, J., dissenting). They urged adoption of a standard requiring proof of an additional connection

between Roberts and the forum, citing the Fourth Circuit's *Young* decision discussed above. App., *infra*, 30a-31a.

The Seventh Circuit also holds that the defendant's knowledge that the plaintiff resides in the forum is sufficient to uphold personal jurisdiction. In *Tamburo* v. *Dworkin*, 601 F.3d 693 (7th Cir. 2010), *petition for cert. filed*, 2010 WL 2709857 (U.S. 2010), the court stated:

> [Defendants] engaged in [defamatory] conduct with the knowledge that [plaintiff] lived in Illinois and operated his business there; their affidavits do not deny this. Thus, although they acted from points outside the forum state, these defendants specifically aimed their tortious conduct at [plaintiff] and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there.

Id. at 706. Because the corporate defendant did not know the plaintiff's state of residence, on the other hand, the assertion of personal jurisdiction over it was improper. *Id.* at 708.

The New Jersey Supreme Court has also embraced a knowledge standard. In *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538 (N.J. 2000), the court made clear that the plaintiff was obliged to show only that the defendant posted intentionally tortious material knowing that the plaintiff resided in the forum:

> We are satisfied that if defendants' statements are capable of a defamatory meaning and were published with knowledge or purpose of causing harm to plaintiff in * * * New

> Jersey, those intentional contacts within the forum would satisfy the minimum contacts requirement of *International Shoe*.

Id. at 556.

B. The Question Presented Regarding Due Process Limits On Personal Jurisdiction Arises Frequently And Is Important.

The issue addressed in this case is one of very substantial practical importance. It has recurred frequently in the lower courts, and—more significantly—is likely to arise even more often in the future given the increasing use of the Internet for posting consumer reviews and other comments. As a result, the uncertain and unpredictable standards for personal jurisdiction in tort claims based on Internet activity will affect an increasingly wide range of interests.

First, in addition to the appellate decisions just discussed, there are at least forty-one other reported decisions addressing the question regarding the due process limits on personal jurisdiction presented here.[4] This large number of decisions itself demon-

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[4] See *Marks* v. *Alfa Grp.*, 369 Fed. Appx. 368 (3d Cir. 2010); *Marten* v. *Godwin*, 499 F.3d 290 (3d Cir. 2007); *Cadle Co.* v. *Schlichtmann*, 123 Fed. Appx. 675 (6th Cir. 2005); *Silver* v. *Brown*, 2010 WL 2354123 (10th Cir. June 14, 2010); *Nw. Healthcare Alliance* v. *Healthgrades.com*, 50 Fed. Appx. 339 (9th Cir. 2002); *Xcentric Ventures, LLC* v. *Bird*, 683 F. Supp. 2d 1068 (D. Ariz. 2010); *EDIAS Software Int'l* v. *Basis Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); *Callaway Golf Corp.* v. *Royal Canadian Golf Ass'n*, 125 F. Supp. 2d 1194 (C.D. Cal. 2000); *Copperfield* v. *Cogedipresse*, 26 Media L. Rep. (BNA) 1185 (C.D. Cal. 1997); *Naxos Resources (U.S.A.) Ltd.* v. *Southam Inc.*, 1996 WL 635387 (C.D. Cal. June 3, 1996); *Blumenthal* v. *Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *Schnapp* v. *McBride*, 64 F. Supp. 2d

strates the need for this Court's guidance—both to clarify the law and to eliminate the need for lower courts to devote scarce judicial resources in choosing among the conflicting approaches for resolving the question.

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608 (E.D. La. 1998); *Jackson* v. *California Newspaper Partnerships*, 406 F. Supp. 2d 893 (N.D. Ill. 2005); *Dedvukaj* v. *Maloney*, 447 F. Supp. 2d 813 (E.D. Mich. 2006); *Winfield Collection, Ltd.* v. *McCauley*, 105 F. Supp. 2d 746 (E.D. Mich. 2000); *Amway Corp.* v. *Proctor & Gamble Co.*, 2000 WL 33725105 (W.D. Mich. Jan. 6, 2000); *Lofton* v. *Turbine Design, Inc.*, 100 F. Supp. 2d 404 (N.D. Miss. 2000); *Software Dev. & Inv. of Nevada* v. *Wall*, 2:05-CV-01109-RLH-LRL, No. 13 (D. Nev. June 2007) (order granting motion to dismiss); *Medinah Mining, Inc.* v. *Amunategui*, 237 F. Supp. 2d 1132 (D. Nev. 2002); *Machulsky* v. *Hall*, 210 F. Supp. 2d 531 (D.N.J. 2002); *Hammer* v. *Trendl*, 2003 U.S. Dist. LEXIS 623 (E.D.N.Y. Jan. 18, 2003) (dicta); *Realuyo* v. *Villa Abrille*, 2003 WL 21537754 (S.D.N.Y. July 8, 2003) (dicta); *Burleson* v. *Toback*, 391 F. Supp. 2d 401 (M.D.N.C. 2005); *Oasis Corp.* v. *Judd*, 132 F. Supp. 2d 612 (S.D. Ohio 2001); *Gorman* v. *Jacobs*, 597 F. Supp. 2d 541 (E.D. Pa. 2009); *D'Onofrio* v. *Il Mattino*, 430 F. Supp. 2d 431 (E.D. Pa. 2006); *English Sports Betting, Inc.* v. *Tostigan*, 2002 WL 461592 (E.D. Pa. Mar. 15, 2002); *Barrett* v. *Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999); *Bailey* v. *Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000); *Monarch Health Scis., Inc.* v. *Amazon Thunder, Inc.*, 2007 WL 3549434 (D. Utah Nov. 15, 2007); *Bochan* v. *La Fontaine*, 68 F. Supp. 2d 692 (E.D. Va. 1999); *Novak* v. *Benn*, 896 So. 2d 513, 514 (Ala. Civ. App.,2004); *Nam Tai Elec's, Inc.* v. *Titzer*, 113 Cal. Rptr. 2d 769 (Cal. Ct. App. 2001); *Jewish Defense Org., Inc.* v. *Superior Court of L.A. Cnty.*, 72 Cal. App. 4th 1045 (Ca. Ct. App. 1999); *Renaissance Health Publ'g, LLC* v. *Resveratrol Partners, LLC*, 982 So. 2d 739 (Fla. Dist. Ct. App. 2008); *Goldhaber* v. *Kohlenberg*, 928 A.2d 948 (N.J. Super. Ct. App. Div. 2007); *Dailey* v. *Popma*, 191 N.C. App. 64 (N.C. Ct. App. 2008); *Wagner* v. *Miskin*, 660 N.W.2d 593 (N.D. 2003); *Am. Bus. Fin. Serv., Inc.* v. *First Union Nat'l Bank*, 2002 WL 433735 (Pa. Com. Pl. Mar. 5, 2002); *Hibdon* v. *Grabowski*, 195 S.W.3d 48 (Tenn. Ct. App. 2005); *Fenn* v. *Mleads Enter., Inc.*, 137 P.3d 706, 709 (Utah 2006).

Second, the frequency with which courts are confronted with this question will continue to increase as a result of the growing ubiquity of online speech.

Surveys indicate that more than 73 million Americans have posted a comment or review online about a product or service; approximately 60 million have posted comments to an online news group, website, blog, or photo site; and over 30 million Americans have created their own online journal or blog.[5] Moreover, online statements have assumed an increasingly important role in Americans' decisionmaking. Over 166 million Americans research and buy products or services online; 173 million get news online; and more than 159 million search for information about someone they know or might meet.[6]

As this mode of communication grows, lawsuits claiming harm from allegedly defamatory speech inevitably will increase. Indeed, that trend already has been documented.[7] Many of these lawsuits will re-

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[5] See Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Trend-Data/Online-Activites-Total.aspx.

[6] See *ibid*. Figures calculated using 231 million as the number of American Internet users. See The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html.

[7] See Susan Stellin, *Hoteliers Look to Shield Themselves from Dishonest Reviews*, N.Y. Times, Oct. 25, 2010, at B7, *available at* http://www.nytimes.com/2010/10/26/business/26hotels.html (noting that 35 million hotel reviews have been posted on the TripAdvisor website and discussing a potential class action to be brought by American and British hotels against the website TripAdvisor and individuals who posted unfavorable reviews online).

quire courts to address the very due process issue presented in this case.

Third, continued uncertainty over the question presented will have a significant adverse effect on numerous individuals and businesses.

Statements posted by individuals and businesses on the Internet are automatically accessible worldwide—access is not limited geographically. A broad standard for establishing personal jurisdiction, such as the one adopted by the majority below, therefore carries a substantial risk that defendants with limited means and limited capacity for negotiating the legal system could be subjected to unanticipated jurisdiction in distant parts of the United States, or of the world.

Requiring individual Internet users to litigate in a distant forum based solely on knowledge of the location of the business or individual discussed in an online communication differs significantly from requiring a more sophisticated business enterprise that is participating commercially in a State's market to appear in that State's courts. Yet some lower courts are equating the two situations, even when the individual has not directed his or her expression to any particular State or recipient. As one commentator has observed, "the intersection of personal jurisdiction law and the Internet raises the specter of subjecting far more persons to suit in far more places." Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821, 1823 (2003).

For an individual, the threat of having to defend oneself in a court far from home could have a chilling effect on Internet speech. "Incorrect characterization

of Internet-based contacts threatens a collision between personal jurisdiction and the First Amendment" that could "destroy the unique platform of free speech provided by the Internet." Brian E. Daughdrill, *Personal Jurisdiction and the Internet: Waiting for the Other Shoe to Drop on First Amendment Concerns*, 51 Mercer L. Rev. 919, 920 (2000).

These practical consequences confirm the need for guidance from this Court regarding the application of the due process standard in this context.

Fourth, numerous commentators have recognized the lack of clarity regarding the due process limits on personal jurisdiction in intentional tort actions involving the Internet.

One commentator has observed: "This basic scenario has been played out in dozens of reported cases * * * whether the target [of internet defamation] can sue at home or not.* * * [T]here is no clear rule; in fact, there is not even really a clear majority position.* * * [B]ut what seems beyond debate is that there ought to be some relatively clear answer so that litigants can direct their resources to resolving the merits of the case rather than the preliminary question of jurisdiction." Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 Nw. U. L. Rev. 473, 473-474 (2004). Other commentators have made the same point.[8] Now is the time for this Court to eliminate the uncertainty and address this important issue.

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[8] See Arthur R. Miller, *The Emerging Law of the Internet*, 38 Ga. L. Rev. 991, 996 (2004) ("[I]n just a few years, there are more cases that have been decided about Internet jurisdiction than have been decided regarding all [other communications] technologies put together * * *."); Wendy Perdue, *Aliens, the*

C. The Ohio Court's Assertion Of Personal Jurisdiction Violates Due Process.

The Ohio Supreme Court's decision is starkly inconsistent with this Court's personal jurisdiction precedents in two key respects. First, the ruling below significantly reduces the nature and extent of the

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Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction, 98 Nw. U. L. Rev. 455, 455-456 (2004) ("[J]urisdictional approahes to e-commerce and cyberspace is complicated by an overlay of constitutional law.* * * [T]he United States is wrestling with what constitutes 'purposeful availment' under the Due Process Clause."); C. Douglas Floyd & Shima Baradaran-Robinson, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind. L.J. 601, 612 (2006) ("Post-*Calder* decisions applying the effects test in cases involving intentional * * * torts committed by means of the Internet have evidenced considerable confusion over * * * applying the *Calder* test."); Daughdrill, *Personal Jurisdiction and the Internet*, at 919 ("Courts attempting to impose traditional personal jurisdiction analysis on Internet-related contacts have no guidance from the Supreme Court and continue to reach inconsistent results * * *."); Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"?: It's Time for the Supreme Court To Straighten Out the Personal Jurisdiction Standard Once Again*, 54 Cath. U. L. Rev. 53 (2004); Michele N. Breen, Comment, *Personal Jurisdiction and the Internet: "Shoehorning" Cyberspace into* International Shoe, 8 Seton Hall Const. L.J. 763, 764-766 (1998); Daniel V. Logue, Note, *If the International Shoe Fits, Wear It: Applying Traditional Personal Jurisdiction Analysis to Cyberspace in* Compuserve, Inc. *v.* Patterson, 42 Vill. L. Rev. 1213, 1214 (1997); Michael A. Geist, *Is There a There There?: Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345 (2001); Titi Nguyen, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 Berkeley Tech. L.J. 519 (2004); Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DePaul L. Rev. 1147 (2005); Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951 (2005).

"minimum contacts" between defendant and forum necessary to impose upon the defendant the costs and inconvenience of litigating, in a distant location, what may well turn out to be a meritless lawsuit. Second, the decision permits personal jurisdiction based on the very foreseeability standard that this Court has consistently rejected.

1. A court may exercise personal jurisdiction over a defendant only if the defendant has "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play.'" *International Shoe*, 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463). A key element of this fairness inquiry assesses the "inconveniences [to the defendant] which would result * * * from a trial away from * * * home." *Id.* at 317 (internal quotations omitted).

Under the rule adopted by the court below, individuals who post online comments about a product purchased from an out-of-state business may be obligated to travel enormous distances to defend themselves against a defamation suit. If a citizen of Miami, for example, ordered what turned out to be a defective product from an Anchorage-based company, she could not use informational websites to warn others about those defects without opening herself up to an intentional tort suit in faraway Alaska.

As long as the purchaser had glanced at the shipping label, the plaintiff business would be able to show that she knew where the business was located. The rule adopted by the court below would allow an Alaska court to assert jurisdiction in a defamation suit—as here, the Alaska court could find that the posting of negative comments was intended to harm the Alaska company and that the Florida resident

knew the harm would occur in Alaska. The Florida resident would then be obligated to mount a defense nearly five thousand miles away from her hometown.

This Court has never permitted the assertion of jurisdiction based on so thin a reed. In *Calder*, for example, the Court's holding that jurisdiction in California was permissible did *not* rest solely on the defendants' knowledge that the subject of their magazine article resided in California; the Court also cited the fact that the magazine for which they worked "ha[d] its largest circulation" in that State. *Calder*, 465 U.S. at 790. And in *Keeton*—another defamation case—the Court concluded that New Hampshire had jurisdiction over a nonresident magazine publisher because it "chose to enter the New Hampshire market," 465 U.S. at 779, by "circulating * * * thousands of magazines" there each month. *Id.* at 774 (internal quotation marks omitted).

Other lower courts have recognized this requirement and have upheld personal jurisdiction only where there is some other connection between the defendant and the forum equivalent to the circulation of a physical publication in the forum State. For example, courts have upheld jurisdiction where the defendant's comments were posted on a website that specifically targets the forum State. See pages 11-14, *supra*.[9]

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[9] The court below did not find that any of the websites on which petitioner posted his comments targeted Ohio; to the contrary, as the dissenting justices pointed out, they were "general auto-racing websites and an auction site, none of which have any specific connection to Ohio or are more likely to be viewed by a resident of Ohio than by a resident of any other state." App., *infra*, 29a (O'Donnell, J., dissenting).

Basing jurisdiction on the mere awareness that the plaintiff is located in the forum State—with no other connections between the defendant and that State—would subject large numbers of nonresidents, frequently individuals with limited resources, to the cost of litigating far from home. As the dissenting justices below concluded, "[s]ubjecting all individuals to suit in Ohio who post Internet reviews—no matter how scathing—of purchases made from Ohio companies does not comport with the due process notions of 'fair play and substantial justice.'" App., *infra*, 31a.

2. This Court has held consistently that the mere foreseeability that a defendant's actions could have effects in the forum State is not a "sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. See also *Burger King*, 471 U.S. at 474. Here, however, the Ohio court held that the mere foreseeability of adverse effects in Ohio *does* allow Ohio to exercise jurisdiction over a nonresident whose actions produced those effects.

The court based its decision on two facts: that petitioner posted comments to an Internet website with the intent to make others aware of what were—in Roberts's estimation—unreasonable business practices by the respondent, see App., *infra*, 2a-5a (majority opinion), and that petitioner knew that respondent was based in Ohio, App., *infra*, 18a.

To conclude—as the Ohio Supreme Court did here—that Ohio may assert personal jurisdiction over Roberts based on these facts, would be to rest jurisdiction on grounds of mere foreseeability. For Roberts's knowledge of respondent's location, combined with his alleged intent to injure respondent, meant that he could foresee that his acts would

cause injury in Ohio. And according to the courts below, that foreseeability is sufficient for jurisdiction.

Indeed, the dissenting justices below recognized that the majority's reasoning was flawed. App., *infra*, 27a-28a, 31a (O'Donnell, J., dissenting) (stating that "the majority focuses on the fact that Roberts could foresee * * * injury to [respondent], an Ohio company," and that "this standard falls far short of due process"). For that reason, as well, the decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2010

APPENDICES

APPENDIX A

126 Ohio St.3d 81

Supreme Court of Ohio.

KAUFFMAN RACING EQUIPMENT, L.L.C., Appellee,

v.

ROBERTS, Appellant.

No. 2008-1038.

Submitted April 22, 2009.

Decided June 10, 2010.

Brett Jaffe and Dennis C. Belli, Columbus, for appellee.

Kepko & Phillips Co., L.P.A., William J. Kepko, and Sherry M. Phillips, Mount Vernon, for appellant.

PFEIFER, J.

{¶ 1} In this case, we address whether an Ohio court can properly assert personal jurisdiction over a nonresident defendant when jurisdiction is predicated on that defendant's publication of allegedly defamatory statements on the Internet. For the reasons that follow, we hold that the trial court erred when it declined to assert personal jurisdiction over the nonresident defendant in this case.

Factual and Procedural Background

{¶ 2} Appellee, Kauffman Racing Equipment, L.L.C. ("KRE"), is an Ohio limited liability company that constructs engine blocks and related high-performance automotive equipment for public sale. Although its business dealings are nationwide, KRE maintains its sole business operations and office in Glenmont, Ohio.

{¶ 3} Appellant, Scott Roberts, is a 30-year resident of Virginia. Roberts has never physically entered Ohio. On February 6, 2006, using the name "Central Virginia Machine," Roberts purchased from KRE an MR-1 Pontiac engine block after viewing the block on KRE's website.

{¶ 4} In October 2006, eight months after purchasing the engine block, Roberts contacted KRE by telephone, claiming that the block was defective. Although its products are sold "as is," KRE offered to retrieve the block from Virginia and bring it back to KRE's Ohio office for inspection. KRE and Roberts agreed that if KRE could verify that the product was defective, it would buy back the engine block at the price paid by Roberts.

{¶ 5} KRE's inspection revealed that after KRE had delivered the block to Roberts, substantial modifications had been made from the block's original

specifications. When KRE contacted Roberts and presented this information, Roberts admitted that Central Virginia Machine had altered the block. Because KRE believed that Roberts's modifications were the cause of the defects, it declined to buy back the block and instead shipped it back to Roberts in Virginia.

{¶ 6} Roberts was dissatisfied. As a result, from October 18, 2006, through November 2006, Roberts posted numerous rancorous criticisms of KRE on various websites devoted to automobile racing equipment and related subjects. His commentary appeared on the public-forum section of the websites PerformanceYears.com and PontiacStreetPerformance.com and in an item description on the Internet auction website, eBay Motors.

{¶ 7} Roberts sought to affect KRE's reputation. In an October 18, 2006 post on the PerformanceYears.com website, Roberts wrote:

{¶ 8} "Bought a MR-1 Block from Kauffman in march [sic] of this year * * *

{¶ 9} "Now, I have and have had since the day the block was delivered, a USELESS BLOCK. I didn't say worthless! I plan to get a lot of mileage out of it[.] And when i'm [sic] done Steve Kauffman will be able to attest to its worth." (Capitalization sic.)

{¶ 10} Later the same day, Roberts added:

{¶ 11} "I did send it back. They still have it. Steve Kauffman admitted on the phone that he got similar numbers on the sonic test as i [sic] did but he won't take it back because I did some work to it and have had it to [sic] long. I guess it doesn't matter that the day I got it all of the **defects** exsisted [sic] and nothing I have done caused them. But don't worry about that. What I loose [sic] in dollars I will make up in entertainment at their expence [sic]." (Boldface sic.)

{¶ 12} The following day, October 19, 2006, Roberts wrote:

{¶ 13} "You don't seem to understand. As far as Steve kauffinan [sic] is concerned the issue is resolved. * * * Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is the perfect place to start. * * * (LOL) * * * Here is another good board to visit! * * * Just trying to help other potential victims." (Emoticons omitted.)

{¶ 14} On the eBay Motors auction site, Roberts ostensibly listed the block for sale. In the item description, he wrote:

{¶ 15} "This is a Kauffman MR-1 Block. It has some real issues. * * * Steve Kaufmann [sic] says it's the best aftermarket block out there for a Pontiac, but I now know better. * * * Basically this block is junk and I have bought an IA-II block to replace it. It has never been assembled. * * * Also the service you

would get from Steve Kauffman of K & M performance is less than honorable. I brought the issues to his attention and he basically gave me the middle finger salute. He would not take it back because I had it for more than 90 days. I will never do business with Kauffman or KRE again. Not just because of the block issues but mostly the lack of service issues. E-mail me and I will tell you the whole story. However the block (junk) is for sale 'as is'!"

{¶ 16} Roberts explained his eBay Motors auction in another post on PerformanceYears.com:

{¶ 17} "As far as the block on e-bay. Thats [sic] nothing more than getting the FACTS out to more people. Do you believe anyone will read that add [sic] and buy it? I can assure you this block issue is faaaaar from over. Do you think I would spread this around like I have and plan to if I thought I couldn't back EVERYTHING up?

{¶ 18} "Again, I am not here to stir any pots. I posted facts I can back up 100%. I can't control what others say or do!" (Capitalization sic.)

{¶ 19} Steve Kauffman of KRE personally received separate inquiries regarding Roberts's Internet postings from at least five Ohio residents.

{¶ 20} Consequently, KRE filed a complaint in Knox County Court of Common Pleas seeking money damages from Roberts for defamation and inten-

tional interference with contracts and business relationships. The trial court granted Roberts's motion to dismiss for lack of personal jurisdiction on June 1, 2007, and dismissed KRE's complaint.

{¶ 21} KRE appealed. The Fifth District Court of Appeals reversed the trial court's judgment. *Kauffman Racing Equip., L.L.C. v. Roberts*, Knox App. No. 07-CA-14, 2008-Ohio-1922, 2008 WL 1821374, ¶ 36. The court of appeals held that the Ohio long-arm statute and Civ.R. 4.3(A) confer jurisdiction on the trial court and that the exercise of personal jurisdiction over Roberts did not deprive him of his right to due process of law under the Fourteenth Amendment to the United States Constitution. Id. at ¶ 23.

{¶ 22} The cause is before this court upon the acceptance of a discretionary appeal. *Kauffman Racing Equip., L.L.C. v. Roberts*, 119 Ohio St.3d 1471, 2008-Ohio-4911, 894 N.E.2d 331.

Law and Analysis

{¶ 23} This case emanates from comments Roberts allegedly made on the Internet. Does this fact affect the way this court should approach the jurisdictional question? In this case, we think not.

{¶ 24} Over 50 years ago, the United States Supreme Court acknowledged that jurisdictional jurisprudence must evolve alongside technological developments: "As technological progress has increased

the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase." *Hanson v. Denckla* (1958), 357 U.S. 235, 250-251, 78 S.Ct. 1228, 2 L.Ed.2d 1283. Along comes the Internet, and with it, the opportunity for civil disputes has greatly expanded. "As [Internet] availability expands, the opportunity for civil disputes could expand proportionately, meaning that the American court system will be called upon to adjudicate an even greater number of cases. Since these cases will be predicated on Internet activity, the parties often will be from different parts of the country, or even from different countries. As a threshold issue, courts must decide whether such cases are properly before them." Scott T. Jansen, Oh, What a Tangled Web * * * The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts (2006), 71 Mo.L.Rev. 177, 180.

{¶ 25} The rise in Internet-related disputes does not mean courts should ignore traditional jurisdiction principles. " '[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time. Although the Internet may have increased the quantity of these occurrences, it has not created problems that are qualitatively more difficult.' " Jansen, 71 Mo.L.Rev. at 182, 183, quoting Allen R. Stein, Symposium, Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision (2004), 98 Nw.U.L.Rev. 411.

{¶ 26} In some cases involving the Internet, the *Zippo* test, developed in *Zippo Mfg. Co. v. Zippo Dot*

Com, Inc. (W.D.Pa.1997), 952 F.Supp. 1119, 1124, has been employed to determine whether Internet activity between the defendant and the forum state establishes jurisdiction. The court established a "sliding scale" approach to Internet-based jurisdiction whereby the level of interactivity of the website is examined to determine whether the exercise of personal jurisdiction is proper. At one end of the scale are "situations where a defendant clearly does business over the Internet." Id. "A defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Neogen Corp. v. Neo Gen Screening, Inc.* (C.A.6, 2002), 282 F.3d 883, 890. At the other end of the *Zippo* scale are informational websites. *Zippo*, 952 F.Supp. at 1124. But as Roberts points out in his brief, "[t]he *Zippo* model was developed in a commercial or business context and is factually distinct from this case." When the Internet activity in question "is non-commercial in nature, the *Zippo* analysis * * * offers little to supplement the traditional framework for considering questions of personal jurisdiction." *Oasis Corp. v. Judd* (S.D.Ohio 2001), 132 F.Supp.2d 612, 622, fn. 9, citing *Mink v. AAAA Dev. L.L.C.* (C.A.5, 1999), 190 F.3d 333, 336. We continue, then, with a traditional jurisdictional analysis.

{¶ 27} Personal jurisdiction is a question of law that appellate courts review de novo. In this case, upon Roberts's motion to dismiss, it became KRE's burden to show that the trial court had personal jurisdiction over Roberts; because the trial court decided Roberts's Civ.R. 12(B)(2) motion upon written

submissions and without an evidentiary hearing, KRE had to make only a prima facie showing of jurisdiction. *Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 107, 532 N.E.2d 117. In making its determination, the court must "view allegations in the pleadings and the documentary evidence in a light most favorable" to the plaintiff and resolving all reasonable competing inferences in favor of the plaintiff. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 236, 638 N.E.2d 541.

{¶ 28} Determining whether an Ohio trial court has personal jurisdiction over a nonresident defendant involves a two-step analysis: (1) whether the long-arm statute and the applicable rule of civil procedure confer jurisdiction and, if so, (2) whether the exercise of jurisdiction would deprive the nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution. *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183-184, 624 N.E.2d 1048. We address those two factors in turn.

{¶ 29} Ohio's long-arm statute, R.C. 2307.382, enumerates specific acts that give rise to personal jurisdiction and provides:

{¶ 30} "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

{¶ 31} " * * *

{¶ 32} "(3) Causing tortious injury by an act or omission in this state;

{¶ 33} "* * *

{¶ 34} "(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state."

{¶ 35} Civ.R. 4.3 allows service of process on nonresidents in certain circumstances and mirrors the long-arm statute:

{¶ 36} "(A) Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. 'Person' includes an individual * * * who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

{¶ 37} "* * *

{¶ 38} "(3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;

{¶ 39} "* * *

{¶ 40} "(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state."

{¶ 41} Roberts contends that Ohio's long-arm statute does not confer personal jurisdiction because he did not direct the alleged tortious statements to Ohio or publish them here. Despite the fact that Roberts's publication of his comments did not emanate from Ohio, those comments were received in Ohio. KRE submitted evidence that at least five Ohio residents had seen the comments posted by Roberts. In *Fallang*, 40 Ohio St.3d 106, 532 N.E.2d 117, paragraph one of the syllabus, this court held, "Civ.R. 4.3(A)(3) authorizes assertion of personal jurisdiction over a nonresident defendant in a defamation action when publication of the offending communication occurs in Ohio." In *Fallang*, the defendant had written an allegedly defamatory letter and had sent it to a person in Ohio. "The tort of libel occurs in the locale where the offending material is circulated (published) by the defendant to a third party. *Keeton v. Hustler Magazine, Inc.* (1984), 465 U.S. 770, 777, 104 S.Ct. 1473, 79 L.Ed.2d 790. In the instant case, [the

defamatory] letter was published in Ohio by virtue of its receipt through the mail. Thus, under the principle announced in *Keeton*, supra, the tort was committed in Ohio." *Fallang*, 40 Ohio St.3d at 107, 532 N.E.2d 117.

{¶ 42} Roberts posted his allegedly defamatory statements on the Internet, ostensibly for the entire world to see. How much of the world saw the comments is unknown; but we do know that at least five Ohioans saw Roberts's statements. The comments were thus published in Ohio. Because Roberts's allegedly defamatory statements were published in Ohio, his alleged tort was committed in Ohio, and he falls within the grasp of R.C. 2307.382(A)(3) and Civ.R. 4.3(A)(3).

{¶ 43} But even if Roberts did not publish or circulate his statements within the territorial boundaries of Ohio, he is not shielded from the reach of Ohio's long arm. "R.C. 2307.382(A)(6) and Civ.R. 4.3(A)(9) permit a court to exercise personal jurisdiction over a nonresident defendant and provide for service of process to effectuate that jurisdiction if the cause of action arises from a tortious act committed outside Ohio with the purpose of injuring persons, when the nonresident defendant might reasonably have expected that some person would be injured thereby in Ohio." *Clark v. Connor* (1998), 82 Ohio St.3d 309, 313, 695 N.E.2d 751.

{¶ 44} Thus, even if we assume that Roberts's alleged tortious conduct did not take place within the territorial boundaries of Ohio, he nonetheless "might

reasonably have expected that [KRE] would be injured thereby in this state." R.C. 2307.382(A)(6). When defamatory statements regarding an Ohio plaintiff are made outside the state yet with the purpose of causing injury to the Ohio resident and there is a reasonable expectation that the purposefully inflicted injury will occur in Ohio, the requirements of R.C. 2307.382(A)(6) are satisfied. It is clear from the postings that Roberts's statements were made with the purpose of injuring KRE. Therefore, the long-arm statute permits the exercise of personal jurisdiction over Roberts in Ohio.

{¶ 45} Ohio's long-arm statute is not coterminous with due process. *Goldstein,* 70 Ohio St.3d at 238, 638 N.E.2d 541, fn. 1. Therefore, although Ohio's long-arm statute confers personal jurisdiction over Roberts, an Ohio court cannot exercise personal jurisdiction over Roberts if doing so would violate his constitutional right to due process. The United States Supreme Court noted in *Internatl. Shoe Co. v. Washington* that due process is satisfied if the defendant has "minimum contacts" with the forum state such that the maintenance of the suit does not offend " 'traditional notions of fair play and substantial justice.' " (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95, quoting *Milliken v. Meyer* (1940), 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278. The minimum-contacts requirement is met when a nonresident defendant "purposefully avails [himself] of the privilege of conducting activities within the forum State." *Hanson,* 357 U.S. at 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

{¶ 46} Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state. *Conti v. Pneumatic Prods. Corp.* (C.A.6, 1992), 977 F.2d 978, 981. "General jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.' " *Bird v. Parsons* (C.A.6, 2002), 289 F.3d 865, 873, quoting *Third Natl. Bank in Nashville v. WEDGE Group, Inc.* (C.A.6, 1989), 882 F.2d 1087, 1089. KRE does not allege that Roberts has continuous and systematic contacts in Ohio such that he would be amenable to jurisdiction for claims arising outside of Ohio.

{¶ 47} Instead, KRE asserts that Ohio has specific jurisdiction over Roberts. Specific jurisdiction applies when "a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 8. KRE alleges that its cause of action is related to or arises out of the defendant's contact with Ohio.

{¶ 48} In *Bird*, the court held that specific jurisdiction "is permissible only if [a defendant's] contacts with Ohio satisfy the three-part test that this court established in *Southern Machine Company v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir.1968):

{¶ 49} " 'First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.' " *Bird,* 289 F.3d at 874.

{¶ 50} In this case, we, too, employ the three-part test from *S. Machine,* 401 F.2d at 381, in determining whether specific jurisdiction here is consistent with due process.

{¶ 51} The first *S. Machine* factor is whether the defendant purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state. "Purposeful availment" is present when the defendant's contacts with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (Emphasis sic.) *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *McGee v. Internatl. Life Ins. Co.* (1957), 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223. The defendant's conduct and connection with the forum must be such that he " 'should reasonably anticipate being haled into court there.' " Id. at 474, quoting *World-Wide Volkswagen Corp. v. Woodson,* (1980) 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'for-

tuitous,' or 'attenuated' contacts," Id. at 475, citing *Keeton,* 465 U.S. at 774, 104 S.Ct. 1473, 79 L.Ed.2d 790, or of the " 'unilateral activity of another party or third person,' " Id., quoting *Helicopteros Nacionales,* 466 U.S. at 417, 104 S.Ct. 1868, 80 L.Ed.2d 404. In certain circumstances, the "plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance the defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises." *Keeton,* 465 U.S. 770 at 780, 104 S.Ct. 1473, 79 L.Ed.2d 790.

{¶ 52} This is a defamation case. The United States Supreme Court addressed purposeful availment in regard to jurisdiction in defamation cases in *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804. In *Calder,* a California resident and actress, Shirley Jones, brought a libel action in California against Florida-resident employees of the National Enquirer, a Florida corporation. Id. at 785. The defendants were the writer and editor of an article that was written in Florida and appeared in the National Enquirer, alleging that Jones drank so heavily that she was unable to fulfill her professional obligations. Id. at 785-786, 788-789, fn. 9. The court held that jurisdiction was proper in California because "[t]he allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms of [Jones's] emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is

the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California." Id. at 788-789.

{¶ 53} The defendants argued that California lacked personal jurisdiction over them because it was their publisher that was responsible for the circulation of the article in California, not they. The defendants analogized themselves to welders employed in Florida who worked on a boiler that subsequently exploded in California. They argued that although jurisdiction would be proper over the manufacturer, it should not be applied to welders, who have no control over and derive no direct benefit from their employer's sales in another state.

{¶ 54} The court exploded the defendants' boiler analogy, focusing on the targeted nature of their activity:

{¶ 55} "Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements

made in their article. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 297, 100 S.Ct. at 567, 62 L.Ed.2d 490; *Kulko v. Superior Court,* 436 U.S. 84, 97-98, 98 S.Ct. 1690, 1699-1700, 56 L.Ed.2d 132 (1978); *Shaffer v. Heitner,* 433 U.S. 186, 216, 97 S.Ct. 2569, 2586, 53 L.Ed.2d 683 (1977). An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Calder,* 465 U.S. at 789-790, 104 S.Ct. 1482, 79 L.Ed.2d 804.

{¶ 56} To rephrase the court's conclusion in *Calder* in a question, should a company injured in Ohio need to go to Virginia to seek redress from a person who, though remaining in Virginia, knowingly caused injury in Ohio? Like the defendants in *Calder,* Roberts is not alleged to have engaged in untargeted negligence. Roberts's Internet commentary reveals a blatant intent to harm KRE's reputation. Roberts knew that KRE was an Ohio company. Roberts impugned the activities that KRE undertakes in Ohio. Roberts hoped that his commentary would have a devastating effect on KRE and that if there were fallout from his comments, the brunt of the harm would be suffered in Ohio.

{¶ 57} The Sixth Circuit Court of Appeals applied the *Calder* "effects" test narrowly in *Reynolds v. Internatl. Amateur Athletic Fedn.* (1994), 23 F.3d 1110. In that case, Butch Reynolds, an Olympic gold-medal-winning track star from Ohio, brought a defamation claim against the International Amateur Athletic Federation ("IAAF") for its publication of a

press release announcing that following a Monte Carlo track meet, Reynolds had tested positive for banned substances. Reynolds alleged personal jurisdiction against the nonresident defendant, IAAF, because its defamatory acts had brought injury to Reynolds in Ohio.

{¶ 58} The court held:

{¶ 59} "We find *Calder* distinguishable for several reasons. First, the press release concerned Reynolds' activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the 'focal point' of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in Ohio is not, in itself, enough to create personal jurisdiction. *World-Wide Volkswagen Corp.*, 444 U.S. at 295, 100 S.Ct. at 566, 62 L.Ed.2d 490. Finally, although Reynolds lost Ohio corporate-endorsement contracts and appearance fees in Ohio, there is no evidence that the IAAF knew of the contracts or of their Ohio origin. *Calder* is a much more compelling case for finding personal jurisdiction." *Reynolds*, 23 F.3d at 1120.

{¶ 60} The within case is much closer to *Calder* than it is to *Reynolds*. The distinguishing aspects in *Reynolds* are not at play here. Unlike the IAAF's

statements about Reynolds's Monaco drug test, Roberts's statements concerned KRE's *Ohio* activities-the manufacture and postsale inspection of the engine block. Unlike Reynolds, who ran races throughout the world, KRE's reputation is centered in Ohio, where it performs all its work. Also, Roberts's Internet postings were published to Ohio residents by Roberts, not by third parties. In sum, the facts of this case square with *Calder* rather than *Reynolds*.

{¶ 61} We note that neither *Calder* nor *Reynolds* involved Internet communication of the allegedly defamatory material. Two cases from the Sixth Circuit do involve defamation cases arising from Internet activity; in both cases, courts attempt to determine whether the case is closer to *Calder* or to *Reynolds*.

{¶ 62} In *Cadle Co. v. Schlichtmann* (C.A.6, 2005), 123 Fed.Appx. 675, Schlichtmann, of Massachusetts, created a website to reveal what he believed to be the unlawful activities of Cadle, an Ohio-based debt collector, in Massachusetts. Cadle filed suit in Ohio for defamation. The court, while proclaiming that Schlichtmann's operation of a website would alone be insufficient to establish jurisdiction, did acknowledge that Schlichtmann's *statements* on the website may be sufficient to justify jurisdiction. Id. at 678-679. The court, in determining whether the defendant's Internet statements gave rise to the exercise of personal jurisdiction, then looked to *Calder* and *Reynolds* and distinguished the two cases. Finding the facts more like those in *Reynolds*, the court declined to assert personal jurisdiction because the alleged defamatory statements were not related

to any activities Cadle undertook in Ohio. Id. at 680. In contrast, in this case, Roberts's posts were premised solely on the activities of KRE in Ohio.

{¶ 63} In *Oasis Corp.*, 132 F.Supp.2d 612, Oklahoma residents had launched a "gripe site" concerning the products of an Ohio corporation. Id. at 614. The Oklahoma residents had not purchased any item from Oasis, but were upset that an Oasis water cooler had caused a fire in a building the defendants were renting. Id. The district court declined to exercise personal jurisdiction because there was no evidence to suggest that the defendants' communications were received by anyone in Ohio other than the plaintiff. Id. at 621. Further, the court found more of a tie to *Reynolds* than to *Calder* :

{¶ 64} "The facts of this case much more closely resemble *Reynolds* than *Calder*. First, Defendants claim on their site that a defective Oasis water cooler started a fire in Oklahoma, not Ohio. Second, Oasis is an international company whose reputation is not centered in Ohio. Third, Defendants' site does not specifically target an Ohio audience. As in *Reynolds*, '[t]he fact that [Defendants] could foresee that [their proclamations would be viewed] and have an effect in Ohio is not, in itself, enough to create personal jurisdiction.' " Id. at 624, quoting *Reynolds*, 23 F.3d at 1120.

{¶ 65} In contrast to the plaintiff in *Oasis Corp.*, Kauffman has alleged-and produced at least some evidence-that the alleged defamatory statements were communicated to Ohio residents other than

Kauffman. Kauffman received inquiries from at least five Ohio residents who read the Roberts postings. Moreover, KRE is an Ohio-based company whose reputation is centered in Ohio and that *had* engaged in commercial activity with Roberts before the controversy.

{¶ 66} The *Calder* effects test is not beyond reproach. It has been called "the source of considerable uncertainty because Internet-based activity can ordinarily be said to cause effects in most jurisdictions." Michael A. Geist, Is There a There? Toward Greater Certainty for Internet Jurisdiction (2001), 16 berkeley Tech.L.J. 1345, 1381. We find this criticism to be invalid. The effects analysis necessitates conduct "calculated to cause injury" in a "focal point" where the "brunt" of the injury is experienced. *Calder*, 465 U.S. at 789-791, 104 S.Ct. 1482, 79 L.Ed.2d 804. "While the effects of Internet conduct may be felt in many [forums], the intent requirement allows a court to find a particular focal point." Jansen, 71 Mo.L.Rev. at 192.

{¶ 67} Roberts argues that mere foreseeability by a nonresident defendant of the effects in the forum state is insufficient to justify the exercise of personal jurisdiction. Roberts's reliance on this conclusion is inapposite because the effects of his conduct went well beyond foreseeability: Roberts *intended* the effects of his conduct to be felt in Ohio. His statements were communicated with the very purpose of having their consequences felt by KRE in Ohio. The contention that his statements were not made with the purpose of injuring some person in Ohio is unavail-

ing. The postings themselves indicate his purpose of injuring Kauffman. For example, on his October 18, 2006, posting, Roberts stated: "What I loose [sic] in dollars I will make up in entertainment at their expence [sic]." On October 19, 2006, he wrote: "Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is a good place to start." Many of the postings name Kauffman directly and specifically mention Ohio.

{¶ 68} Here, Roberts not only knew that Ohio resident KRE could be the victim, he intended that it be the victim. The allegedly defamatory communications concerned KRE's activities in Ohio. We are not dealing with a situation in which jurisdiction is premised on a single, isolated transaction. The posts detailed the transactions between Roberts and KRE. Moreover, the purchase of the engine block and subsequent transfers from Virginia to Ohio and back again served as the foundation from which this dispute arose. Roberts's allegedly defamatory posts were predicated on his course of dealing with an Ohio resident corporation. At least five Ohio residents other than Kauffman read these postings. Finally, although KRE does business nationwide, its business reputation is centered in Ohio, because Ohio is the location of its sole base of operations. Roberts knew, and in fact intended, that the brunt of the harm caused be felt by KRE in Ohio. Thus, the focal point of the damage was Ohio, and Roberts's actions therefore fulfill the requirement of causing a consequence in Ohio.

{¶ 69} Here, KRE has made a prima facie showing that Roberts purposefully availed himself of Ohio law. When viewed in a light most favorable to KRE, the evidence shows that Roberts intentionally and tortiously sought to harm KRE's reputation and negatively affect its contracts and business relationships. Therefore, KRE meets the first of the *S. Machine* factors.

{¶ 70} Having recognized Roberts's contacts in Ohio, we now address the second *S. Machine* prong, which involves an analysis of whether KRE's claims arise from those contacts. "If a defendant's contacts with the forum state are related to the operative facts of the controversy, then an action will be deemed to have arisen from those contacts." *CompuServe, Inc. v. Patterson* (C.A.6, 1996), 89 F.3d 1257, 1267. This "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.' " (Emphasis added in *Third Natl.*) *Third Natl. Bank*, 882 F.2d at 1091, quoting *S. Machine Co.*, 401 F.2d at 384, fn. 27. Further, a "lenient standard * * * applies when evaluating the 'arising from' criterion." *Bird*, 289 F.3d at 875. Under this standard, KRE has made a prima facie showing that the cause of action arose from Roberts's contacts with Ohio. Not only does the cause of action arise from defamatory statements, those statements themselves are predicated on the business dealings between Roberts and KRE. The catalyst for Roberts's actions was his Ohio contacts. In fact, but for his contacts with Ohio, Rob-

erts's allegedly defamatory statements would not have been posted.

{¶ 71} Under the third and final prong of the *S. Machine* test, the acts of the nonresident defendant or consequences caused by the defendant must have a substantial connection with the forum state to make exercise of jurisdiction over the defendant reasonable. When "the first two elements of a prima facie case [are satisfied] then an inference arises that this third factor is also present." *CompuServe, Inc.*, 89 F.3d at 1268, citing *Am. Greetings Corp. v. Cohn* (C.A.6, 1988), 839 F.2d 1164, 1170. " '[O]nly the unusual case will not meet this third criterion.' " *Am. Greetings,* 839 F.2d at 1170, quoting *First Natl. Bank of Louisville v. J.W. Brewer Tire Co.* (C.A.6, 1982), 680 F.2d 1123, 1126.

{¶ 72} A number of factors are relevant to the reasonableness inquiry. A court first must consider Ohio's interest in the controversy. *In-Flight Devices Corp. v. Van Dusen Air, Inc.* (C.A.6, 1972), 466 F.2d 220, 232. "[I]t is beyond dispute that [a forum state] has a significant interest in redressing injuries that actually occur within the State." *Keeton,* 465 U.S. at 776, 104 S.Ct. 1473, 79 L.Ed.2d 790. "Ohio has a legitimate interest in protecting the business interests of its citizens * * *." *Bird,* 289 F.3d at 875. "The United States Supreme Court has indicated that a high degree of unfairness is required to erect a constitutional barrier against jurisdiction. * * * This is especially true in a case (such as the one herein) in which the defendant has intentionally directed his activity at forum residents * * *, and the 'effects' of

the activity occur in the forum state. *Calder v. Jones*, [465 U.S.] at 788-789 [104 S.Ct. at 1486-87, 79 L.Ed.2d 804]." *Fallang*, 40 Ohio St.3d at 108, 532 N.E.2d 117. KRE and Ohio clearly have an interest in KRE's obtaining the relief sought, and Ohio is the appropriate forum.

{¶ 73} We conclude that the exercise of jurisdiction over Roberts in this case is reasonable, satisfying the third part of the *S. Machine* test.

Conclusion

{¶ 74} Viewing the evidence in a light most favorable to KRE, we conclude that Ohio's long-arm statute and the applicable rule of civil procedure confer jurisdiction over Roberts and that an exercise of jurisdiction of the trial court would not deprive this nonresident defendant of the right to due process of law under the Fourteenth Amendment to the United States Constitution. KRE has made a sufficient showing that Roberts caused tortious injury in this state by acts committed outside of Ohio with the purpose of injuring KRE. His communications specifically targeted a known Ohio resident, and the cause of action arises from the substantial connection Roberts made with Ohio through his course of dealing with KRE. We decline to allow a nonresident defendant to take advantage of the conveniences that modern technology affords and simultaneously be shielded from the consequences of his intentionally tortious conduct. Therefore, we affirm the judgment of the court of appeals.

Judgment affirmed.

LUNDBERG STRATTON, O'CONNOR, and CUPP, JJ., concur.

O'DONNELL and LANZINGER, JJ., dissent.

BROWN, C.J., not participating.

O'DONNELL, J., dissenting.

{¶ 75} Respectfully, I dissent. Today, the majority has extended the personal jurisdiction of Ohio courts to cover any individual in any state who purchases a product from an Ohio company and posts a criticism of it on the Internet with the intent to damage the seller. This holding changes long-arm jurisdiction dramatically. In my view, because minimum contacts with Ohio are not present in all such circumstances, the majority's holding does not withstand due process scrutiny.

{¶ 76} "[T]he constitutional touchstone [of long-arm jurisdiction] remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528. While the majority focuses on the fact that Roberts could foresee and even intended to cause injury to Kauffman Racing Equipment, L.L.C. ("KRE"), an

Ohio company, the United States Supreme Court "has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." Id., quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 295, 100 S.Ct. 559, 62 L.Ed.2d 490. Rather, personal jurisdiction is proper if the defendant's conduct and connections with the forum state "proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." (Emphasis sic.) Id. at 475, quoting *McGee v. Internatl. Life Ins. Co.* (1957), 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223. The defendant's actions must have created that connection to such a degree that he " 'should reasonably anticipate being haled into court there.' " Id., quoting *World-Wide Volkswagen* at 297, 100 S.Ct. 559, 62 L.Ed.2d 490. When the defendant does not have an ongoing relationship with the forum state, a defendant must *deliberately* engage in significant activities within that state and " 'purposefully direct[ ]' his activities at residents of the forum" to satisfy this standard. Id. at 472, quoting *Keeton v. Hustler Magazine, Inc.* (1984), 465 U.S. 770, 774, 104 S.Ct. 1473, 79 L.E.2d 790; see also *Anilas, Inc. v. Kern* (1987), 31 Ohio St.3d 163, 164, 31 OBR 366, 509 N.E.2d 1267 ("the focus of analysis ought to be whether one *purposely* established contacts with the forum state" [emphasis sic]).

{¶ 77} Relying primarily on *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804, the majority concludes that Roberts exercised minimum contacts with Ohio sufficient to satisfy due process because he posted defamatory comments relating to a consumer transaction with KRE on three

websites, intending them to have effects felt in Ohio, and the evidence indicates that five identified Ohio residents read them. However, *Calder* does not conclusively confer jurisdiction in the forum state simply because the defendant's intended effects of the communication are felt in that state. Rather, the court in *Calder* considered the location of the injury and the *pervasive nature of the contact* when assessing whether the defendants had the minimum contacts with the forum state. The court stressed that the newspaper in which the article appeared, the National Enquirer, had its largest circulation, almost twice that in any other state, in California, where the plaintiff resided. It was that detail *coupled with* the fact that the person about whom the article was written lived and would suffer injury in California that rendered California the focal point of the publication. Based upon those facts, the court identified minimum contacts sufficient to demonstrate that the defendants could "reasonably anticipate being haled into court there." Id. at 790, quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559, 62 L.Ed.2d 490.

{¶ 78} But the facts of this case are easily distinguishable from those in *Calder*. Here, Roberts posted his comments on three general auto-racing websites and an auction site, none of which have any specific connection to Ohio or are more likely to be viewed by a resident of Ohio than by a resident of any other state. In fact, KRE could identify only five Ohio residents it believes actually viewed Roberts's comments. In *Calder*, on the other hand, the National Enquirer sold approximately 600,000 copies of the offending article in the forum state. *Calder*, 465 U.S.

at 785, 104 S.Ct. 1482, 79 L.Ed.2d 804. The reach of Roberts's comments to Ohio residents is not at all comparable to the reach of the National Enquirer's circulation to California residents.

{¶ 79} By merely posting to general websites, Roberts neither *deliberately* engaged in significant activities within Ohio nor *purposefully directed* his activities at an Ohio resident sufficient to establish minimum contacts and satisfy due process-regardless of his intent.[1] See, e.g., *Oasis Corp. v. Judd* (S.D.Ohio 2001), 132 F.Supp.2d 612, 623 (declining to find jurisdiction because "[t]he computers hosting Defendants' [web]site are not located in Ohio, there has been no meaningful interactivity between the site and a significant number of Ohioans, and the site is not directed toward an Ohio audience * * *"); see also *Young v. New Haven Advocate* (C.A.4, 2002), 315 F.3d 256, 263 ("the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website

[1] The majority does not find sufficient contacts to confer jurisdiction based solely on the parties' underlying transaction, nor should it. See *Clark v. Connor* (1988), 82 Ohio St.3d 309, 314, 695 N.E.2d 751, 756, quoting *Burger King*, 471 U.S. at 479, 105 S.Ct. 2174, 85 L.E.2d 528 (finding that an in-state plaintiff's contract with an out-of-state defendant, standing alone, does not establish sufficient minimum contacts and that "'prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing'" must be considered). Here, while the transaction involved the purchase and return of a product, there is no evidence that the parties expressly or implicitly contemplated future consequences or a longer relationship.

content to a Virginia audience"). While it is evident from Roberts's Internet posts that he sought to discourage others from purchasing KRE's products, any individual who posts a negative review of a product or service in a public forum arguably seeks the same objective. Subjecting all individuals to suit in Ohio who post Internet reviews-no matter how scathing-of purchases made from Ohio companies does not comport with the due process notions of "fair play and substantial justice." *Internatl. Shoe Co. v. Washington, Office of Unemp. & Placement* (1945), 326 U.S. 310, 320, 66 S.Ct. 154, 90 L.Ed. 95.

{¶ 80} The foreseeability of causing injury to an Ohio company, whether the injury is intended or not, without directing activity at forum residents, is not sufficient to establish minimum contacts. See *Burger King,* 471 U.S. at 474, 105 S.Ct. 2174, 85 L.Ed.2d 528; see also *New Haven Advocate,* 315 F.3d at 263 (narrowly construing *Calder* and holding that "[t]he newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers"). Notwithstanding this traditional jurisdictional principle, the majority has provided an avenue for any affected Ohioan to sue the originator of any negative Internet post in an Ohio court when the product has been purchased in Ohio and the negative post is read by an Ohio resident. But this standard falls far short of due process.

{¶ 81} Since this case is limited to the jurisdictional aspects of the litigation, the parties have not briefed, nor has the court addressed, the First Amendment rights of those who post comments on

the Internet. The Supreme Court of the United States in *Calder* "reject[ed] the suggestion that First Amendment concerns enter into the jurisdictional analysis [and] declined * * * to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Calder*, 465 U.S. at 790-791, 104 S.Ct. 1482, 79 L.Ed.2d 804. Nonetheless, the practical impact of the majority's holding in this case is to unnecessarily chill the exercise of free speech.

{¶ 82} Because Roberts's conduct does not establish minimum contacts with Ohio sufficient to comport with due process, I would reverse the judgment of the court of appeals.

LANZINGER, J., concurs in the foregoing opinion.

APPENDIX B

2008 WL 1821374

Court of Appeals of Ohio,

Fifth District, Knox County.

KAUFFMAN RACING EQUIPMENT, L.L.C.,
Plaintiff-Appellant

v.

Scott ROBERTS, Defendant-Appellee.

No. 07-CA-14.

Decided April 18, 2008.

Appeal from the Knox County Court of Common Pleas, Case No. 07OT01-004.

Brett Jaffe, Columbus, OH, for plaintiff-appellant.

William J. Kepko, Mount Vernon, OH, for defendant-appellee.

HOFFMAN, P.J.

{¶ 1} Plaintiff-appellant Kauffman Racing Equipment, LLC ("Kauffman Racing") appeals the June 1, 2007 Judgment Entry entered by the Knox County Court of Common Pleas, which granted defendant-

appellee Scott Roberts' Motion to Dismiss for Lack of Personal Jurisdiction.

STATEMENT OF THE FACTS AND CASE

{¶ 2} Kauffman Racing is an Ohio Limited Liability Company engaged in the business of selling engine blocks and related high performance racing equipment. It maintains its sole business office and operations in Glenmont, Knox County, Ohio. Kauffman Racing specializes in the sale of after-market engine blocks for Pontiac competition automobiles. The company averages approximately $750,000 in annual gross sales.

{¶ 3} On February 6, 2006, Kauffman Racing sold an MR-1 engine block and related equipment to a buyer, using the name "Central Virginia Machine", for the purchase price of $2,873.75. Kauffman Racing subsequently learned Roberts was the actual purchaser of the MR-1 engine block at issue herein. Roberts selected the engine block after viewing Kauffman Racing's Internet site. Approximately eight months after the purchase, in October, 2006, Roberts telephoned Kauffman Racing, complaining the engine block was defective. Roberts had not expressed to Kauffman Racing any dissatisfaction with the item prior to this time.

{¶ 4} Although the engine blocks and racing products marketed by Kauffman Racing are sold "as is" due to the extreme demands placed on the equipment, Kauffman Racing chose to make an effort to

verify Roberts' claim of manufacturing defects in the engine block. Kauffman Racing proposed the engine block be shipped to Ohio, for inspection, and if the part was found defective as a result of Kauffman Racing's doing, the company would buy back the engine block at the original purchase price. Roberts accepted the terms and conditions of this arrangement. Kauffman Racing arranged for the engine block to be picked up in Virginia, and returned to its Ohio plant.

{¶ 5} Upon inspection, Kauffman Racing found the engine block had been substantially modified from the original specifications in which it had been shipped to Central Virginia Machine, in February, 2006. Kauffman Racing contacted Roberts, inquiring as to whom had undertaken the modifications of the engine block. Roberts admitted Central Virginia Machine had worked on the part. Kauffman Racing advised Roberts it would not buy back the engine block as the defects of which he complained were the result of modifications made subsequent to the sale and delivery of the part, and not by the manufacturer of the block itself. Kauffman Racing shipped the engine block to Roberts in Virginia. Thereafter, from October 18, 2006, through November, 2006, Roberts posted a number of statements on the bulletin board pages of Internet sites dedicated to automobile racing equipment, performance, and related subjects.

{¶ 6} As a result of these postings, Kauffman Racing filed a Complaint in the Knox County Court of Common Pleas, alleging Roberts had injured the company's reputation and business by posting false and malicious statements on the Internet. Kauffman

Racing sought monetary damages from Roberts for defamation and intentional interference with contracts and business relationships. Kauffman Racing perfected service of process on Roberts pursuant to Civ. R. 4 .3. In response, Roberts filed a motion to dismiss for lack of personal jurisdiction. Via Judgment Entry filed June 1, 2007, the trial court granted Roberts' motion to dismiss, and dismissed Kauffman Racing's Complaint.

{¶ 7} It is from this judgment entry Kauffman Racing appeals, raising the following assignment of error:

{¶ 8} "I. THE COURT OF COMMON PLEAS ERRED AS A MATTER OF LAW WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION TO DISMISS PLAINTIFFAPPELLANT'S COMPLAINT FOR LACK OF JURISDICTION OVER HIS PERSON."

{¶ 9} We review a trial court's judgment granting a motion to dismiss for lack of personal jurisdiction de novo. *Joffe v. Cable Tech, Inc.*, 163 Ohio App.3d 479, 2005-Ohio-4930, 839 N.E.2d 67, at ¶ 10. To defeat a non-resident defendant's motion to dismiss premised upon jurisdictional grounds, a plaintiff must make a prima facie demonstration the trial court has personal jurisdiction over the defendant. See *Yauger v. Hamilton Sorter Co.* . (Oct. 18, 1993), Butler App. No. CA93-02-030; *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165. A prima facie showing is made where the plaintiff produces sufficient evidence to allow reasonable minds

to conclude that the trial court has personal jurisdiction over the defendant. *Id.* at 307, 471 N.E.2d 165. In making this determination, a trial court must "view allegations in the pleadings and the documentary evidence in a light most favorable" to the plaintiff and resolve "all reasonable competing inferences" in favor of the plaintiff. *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 236, 638 N.E.2d 541, 1994-Ohio-229; *Giacchetti* at 307, 471 N.E.2d 165.

{¶ 10} In deciding whether Ohio has jurisdiction over non-resident defendants, a court must engage in a two-step analysis. *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.* (1994), 68 Ohio St.3d 181, 183, 624 N.E.2d 1048; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477. The court must first determine whether Ohio's long-arm statute, R.C. 2307.382, and the applicable Rule of Civil Procedure, Civ.R. 4.3(A), confer jurisdiction. *U.S. Sprint Communications* at 184, 624 N.E.2d 1048, 624 N.E.2d 1048; *Kentucky Oaks Mall Co.* at 75, 559 N.E.2d 477. Second, the court must determine whether granting jurisdiction would deprive the nonresident of due process of law under the Fourteenth Amendment to the United States Constitution. *Id.*

{¶ 11} The Ohio long-arm statute, section 2307.382 of the Ohio Revised Code, provides, in pertinent part:

{¶ 12} "(A) A court may exercise personal jurisdiction over a person who acts directly or by an

agent, as to a cause of action arising from the person's:

{¶ 13} " * * * *

{¶ 14} "(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;"

{¶ 15} Under the first prong of the *U.S. Sprint* test, we must decide whether Kauffman Racing has presented a prima facie case establishing the trial court has limited personal jurisdiction over Roberts under R.C. 2307.382. The evidence before the trial court shows, from a computer outside of Ohio, Roberts posted messages about Kauffman Racing on a number of websites.

{¶ 16} On October 18, 2006, Roberts posted the following message on the forum page of the Performance Years website:

{¶ 17} "Bought a MR-1 Block from Kauffman in march [sic] of this year * * * Now, I have and have had since the day the block was delivered, a USELESS BLOCK. I didn't say worthless! I plan to get a lot of mileage out of it[.] And when i'm [sic] done Steve Kauffman will be able to attest to its worth."

{¶ 18} Later the same day, Roberts added:

{¶ 19} "I did send it back. They still have it. Steve Kauffman admitted on the phone that he got similar numbers on the sonic test as i[sic] did but he won't take it back because I did some work to it and have had it to [sic] long. I guess it doesn't matter that the day I got it all of the defects exsisted [sic] and nothing I have done caused them. But don't worry about that. What I loose [sic] in dollars I will make up in entertainment at their expence [sic]."

{¶ 20} The following day, October 19, 2006, Roberts wrote:

{¶ 21} "You don't seem to understand. As far as Steve kauffman [sic] is concerned the issue is resolved. * * * Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is the perfect place to start. * * *(LOL)[1] * * * Here is another good board to visit! * * * Just trying to help other potential victims." (Emoticons omitted).

{¶ 22} On the EBay Automotive site, more of the same is found. We find Roberts' act of posting messages on various Internet sites was "committed with the purpose of injuring" Kauffman Racing, and such purpose is clearly seen in the content of Roberts' postings. As such, we find Ohio's long-arm statute

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[1] "LOL" is on-line jargon for "Laugh Out Loud."

and Civ. R. 4.3(A) confer jurisdiction on the trial court.

{¶ 23} Although we find the trial court has limited personal jurisdiction over Roberts under Ohio's long-arm statute and Civ. R. 4.3(A), our inquiry is not finished. We also must consider whether the jurisdiction granted under the long-arm statute is consistent with "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (Quotation omitted).

{¶ 24} The Due Process Clause protects an individual from being subject to the binding judgments of a forum in which he has not established any meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 471-472, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *Internatl. Shoe Co.*, supra. Due process is satisfied if a forum has either specific or general jurisdiction over a non-resident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414-415, 104 S.Ct. 1868, 80 L.Ed.2d 404, fns. 8 and 9. Specific jurisdiction turns upon the relationship between the defendant, forum, and litigation, and exists only when the litigation at hand arises out of or relates to a defendant's "minimum contacts" with the forum. *Burger King* at 472, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528. General jurisdiction, on the other hand, is based upon "continuous and systematic" contacts with the forum that are unrelated to the underlying litigation. *Helicopteros* at 415, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, fn. 9.

{¶ 25} In order for a trial court to assert limited personal jurisdiction over an out-of-state defendant, three criteria must be satisfied: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from the defendant's activities there; and (3) the acts of the defendant or the consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable. *South Mach. Co. v. Mohasco Indus., Inc.* (6th Cir.1968), 401 F.2d 374, 381.

{¶ 26} Regardless of the classification, jurisdiction is proper only when the party " 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'." *Burger King* at 475, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528, quoting *Hanson v. Denckla* (1958), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283. The "purposeful availment" requirement-the Constitutional touchstone of personal jurisdiction-ensures a party will only be haled into a jurisdiction where it has either deliberately engaged in significant activities or created continuing obligations between itself and residents of the state. *Burger King,* 471 U.S. at 475-476, 105 S.Ct. 2174, 85 L.Ed.2d 528.

{¶ 27} The development and advances in technology have required Federal and State Courts to tackle unique situations such as the one presented in the instant action. In *Zippo Manufacturing Co. v. Zippo*

Dot Com (1997), 952 F.Supp. 1119, the United States District Court, W.D. Pennsylvania, addressed the issue of personal jurisdiction over a non-resident defendant in the "doing business over the Internet" context, and remarked:

{¶ 28} "In *Hanson v. Denckla,* the Supreme Court noted that '[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase.' *Hanson v. Denckla,* 357 U.S. 235, 250-51, 78 S.Ct. 1228, 1237-39, 2 L.Ed.2d 1283 (1958). Twenty seven years later, the Court observed jurisdiction could not be avoided 'merely because the defendant did not *physically* enter the forum state.' *Burger King,* 471 U.S. at 476, 105 S.Ct. at 2184. The Court observed that:

{¶ 29} " '[I]t is an inescapable fact of modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.' *Id.*

{¶ 30} "Enter the Internet, a global " 'supernetwork" of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide.' *Panavision Intern., L.P. v. Toeppen,* 938 F.Supp. 616 (C.D.Cal.1996) (*citing American Civil Liberties Union v. Reno,* 929 F.Supp. 824, 830-48(E.D.Pa.1996)). 'In recent years, businesses have begun to use the Internet to provide information and products to consumers and other businesses.' *Id.* The Internet

makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. * * *.

{¶ 31} "Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents, the exercise of specific jurisdiction is proper. *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183-84. *Different results should not be reached simply because business is conducted over the Internet.*" *Zippo*, supra, at 1123-1124. (Emphasis added).

{¶ 32} We recognize the instant action does not involve the same factual scenario as *Zippo*, supra, however, we find that decision instructive. In the decade plus which has passed since *Zippo*, supra, was decided, the Internet has evolved beyond what the average person could ever have imagined. The Internet knows no state boundaries. The Internet has also become accessible at virtually every coffee shop in the world. A non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a

shield against defending tortious activity against a plaintiff harmed in a different state.

{¶ 33} In his Brief to this Court, Roberts asserts, "There is no evidence that he targeted Ohio residents or even targeted a business whose customers were limited to Ohio." Roberts adds, he did not know "Ohio residents would access the site." We find Roberts' argument unconvincing. The alleged defamation concerned a business located in Ohio and the business practices of an Ohio resident. Roberts was aware of these facts when he posted his messages. Although Kauffman Racing conducted business over the Internet, which is accessible worldwide, the defamation impugned the propriety of Kauffman Racing's business dealings, which are centered in Ohio. The brunt of the harm, in terms of the injury to Kauffman Racing's professional reputation and business, was suffered in Ohio. In sum, Ohio is the focal point both of the defamation and of the harm suffered. Jurisdiction over Roberts is, therefore, proper in Ohio based upon the "effects" of his Virginia conduct in Ohio. See, *Calder v. Jones* (1984), 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804; *World-Wide Volkswagen*, supra at 297-298.

{¶ 34} Today, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As the ability to do harm has grown, so must the law's ability to protect the innocent.

{¶ 35} Kauffman Racing's sole assignment of error is sustained.

{¶ 36} The matter is reversed and remanded to the trial court for further proceedings consistent with this opinion and the law.

HOFFMAN, P.J., and FARMER, J., concurs.

DELANEY, J. dissents.

DELANEY, J., dissenting.

{¶ 37} I agree with the majority's statement of the law governing the issue of personal jurisdiction under Ohio's long-arm statute. However, I disagree with the majority's application of the law, particularly the *Calder* "effects test", to the facts of this case.

{¶ 38} Here, the cause of action arose from Roberts posting allegedly defamatory comments on Internet bulletin boards, which are an increasingly popular forum of communication. Many businesses and organizations solicit public opinion and dialogue via bulletin boards. These "customer satisfaction forums" exist so people can post comments, suggestions, compliments or grievances on numerous consumer products and services, such as vacation resorts, restaurants, and as here, automotive components. These bulletin boards are the electronic equivalent of a response card. They are targeted

based upon a shared interest in a particular topic, rather than based on a geographic location.

{¶ 39} In *Calder,* the U.S. Supreme Court concluded that a California state court had personal jurisdiction over the *National Enquirer,* a nationally distributed weekly with editorial offices in Florida, and a reporter and an editor, both Florida residents, in a lawsuit based on an allegedly libelous story about the activities of a California resident. Employing what has since become known as the "effects test", the Court reasoned that because "California is the focal point both of the story and of the harm suffered," jurisdiction over the defendants was "proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804. In the language of minimum contacts, when the defendants committed "their intentional, and allegedly tortious, actions ... expressly aimed at California," they "must [have] 'reasonably anticipate[d] being haled into court there' to answer for the truth of the statement made in their article." *Id.* at 789-90, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (citations omitted).

{¶ 40} The majority in this case focuses only upon the alleged harm of Roberts' actions being felt in Ohio. However, this is insufficient based upon the "effects test", which also requires that the defendant expressly aim his tortious conduct at the forum. *Id.* See also, *Cadle v. Schlichtmann, et al.,* Case No. 4:03CV2151, 2004 WL 3630539 (N.D.Ohio) (in order to establish personal jurisdiction based upon defamatory commercial advertising on website, a defendant

must "purposefully direct" activities toward the state of Ohio).

{¶ 41} In this matter, Roberts' posting were accessible around the world and there is no evidence or allegation Roberts directly targeted, solicited or interacted with Ohio residents via the bulletin board. Even though Roberts knew Kauffman Racing was located in Ohio, Kauffman Racing did not show that Roberts had expressly aimed his tortious conduct at Ohio, thus "minimum contacts" with Ohio as it relates to the bulletin board messages was never created for purposes of long-arm jurisdiction.

{¶ 42} Even assuming Roberts knew the postings could be accessible and read by Ohio residents; this is insufficient contact to warrant exercise of personal jurisdiction. See, *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir.2003)(" * * * [m]ere operation of a commercially interactive web site does not subject the operator to jurisdiction anywhere in the world. Rather there must evidence that the defendant "purposely availed" itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts."); and *Young v. New Haven Advocate, et al.*, 315 F.3d 256 (4th Cir.2002), *cert. denied*, 538 U.S. 1035, 123 S.Ct. 2092, 155 L.Ed.2d 1065 (2003)(Connecticut newspaper did not target readers of Virginia simply by making its content available online; a Virginia court could properly exercise jurisdiction under the "effects test" only if

newspaper had manifested an intent to target and focus on a Virginia audience).

{¶ 43} This conclusion is supported by other cases addressing Internet activity and long-arm jurisdiction. See, *Novak v. Benn*, 896 So.2d 513 (Ala.Civ.App.2004) (defendant's disparaging comments about the plaintiff, a resident of Alabama, in an Internet forum did not subject him to suit in Alabama without a showing the defendant purposefully directed his comments to Alabama); *Griffis v. Luban*, 646 N.W.2d 527 (Minn.2002), *cert.denied*, 538 U.S. 906, 123 S.Ct. 1483, 155 L.Ed.2d 225 (2003) (a Minnesota resident posting a message on the Internet challenging Alabama teacher's credentials did not subject Minnesota resident to suit in Alabama under *Calder* "effects test" even though she knew plaintiff lived and worked in Alabama); *Oasis Corp., et al. v. Judd, et al.*, 132 F.Supp.2d 612 (S.D.Ohio 2001) (Oklahoma residents launched a "gripe site" on Internet concerning products of Ohio company; trial court concluded Ohio was not the "focal point" of the website's accusations because "[w]hile it is obvious that Oasis, an Ohio company is the subject of the Defendants' web site, there is no evidence to suggest that Defendants have targeted Ohioans, as an audience for their site any more vigorously than Oregonians, Oklahomans or Omanis", therefore it lacked jurisdiction under the "effects test").[1]

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[1] Kauffman Racing's reliance upon the Ohio Supreme Court's opinion in *Fallang v. Hickey* (1988) 40 Ohio St.3d 106, 532 N.E.2d 117, is misplaced. In *Fallang*, the Court found personal jurisdiction under Ohio long-arm statute because the defendant committed an intentional act by mailing a defamatory letter to

{¶ 44} Under the facts of this case, I find Roberts' activity to be too attenuated to support a finding of personal jurisdiction under the Due Process Clause. To hold otherwise, subjects online communicators to be subject to suit in any state for which the website content is accessible and without evidence of express aiming or intentional targeting. Accordingly, I would affirm the trial court's dismissal of Kauffman Racing's complaint for lack of personal jurisdiction.

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a resident in Ohio. The Court stated this "single purposeful contact is enough to satisfy the requirements of due process." *Id.* at 108, 532 N.E.2d 117. In this case, there is no evidence Roberts intentionally acted to target any Ohio resident with the bulletin board messages.

APPENDIX C

2007 WL 5282149

Court of Common Pleas of Ohio.

Knox County

KAUFFMAN RACING EQUIPMENT, LLC, Plaintiff,

v.

Scott ROBERTS, Defendant.

No. 07OT01-0004.

June 1, 2007.

Judgment Entry

Otho Eyster, Judge.

This matter came before the Court on the Motion Of Defendant Scott Roberts To Dismiss and the Court having considered the pleadings, memorandums and the applicable law finds this Court lacks personal jurisdiction over the Defendant, Scott Roberts, and it is

ORDERED Defendant's Motion To Dismiss is granted and this action is hereby dismissed. Costs to Plaintiffs.

IT IS SO ORDERED.

No. 10-617

In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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December 8, 2010

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause permits a state court to exercise personal jurisdiction over a non-resident defendant who expressly aims at the forum state a series of defamatory Internet postings arising from, and pertaining to, a prior course of commercial dealing with the plaintiff in the forum state?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Kauffman Racing Equipment L.L.C., an Ohio limited liability company, is not a subsidiary or affiliate of a publicly held company. No publicly owned company owns 10% or more of the membership interests of Kauffman Racing Equipment L.L.C.

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REASONS FOR DENYING THE PETITION

The petition filed by Petitioner Scott Roberts ("Roberts") seeks a writ of certiorari for the purpose of having this Court decide whether the Due Process Clause of the Fourteenth Amendment permits a state court to exercise long-arm jurisdiction over a nonresident to adjudicate an Internet defamation claim based solely on the defendant's knowledge that the plaintiff resided in the forum state. The question as framed by Roberts, while seemingly intriguing, bears no resemblance to the case that was actually litigated in the Ohio courts. Respondent Kauffman Racing Equipment L.L.C. ("KRE") respectfully submits that the petition for certiorari should be denied for the following reasons.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION RAISED IS NOT FAIRLY PRESENTED BY THE RECORD.

Rule 10 of this Court's rules of practice admonishes the erstwhile petitioner that a writ of certiorari is a matter of judicial discretion rather than entitlement, and will be granted only for "compelling reasons". This Court has emphasized that certiorari is not appropriate when the constitutional question proposed by the petition is not fairly presented by the record, *Rogers v. United States*, 522 U.S. 252, 253 (1998) or "is not presented with sufficient clarity," *McClanahan v. Morauer & Hatzell*, 404 U.S. 16 (1971); or when "the totality of the circumstances disclosed fails to support the substantial due process issues tendered in the petition[ ] for certiorari." *Boldanado v. California*, 366 U.S. 417 (1961).

Roberts's petition attempts to concoct a split of authority among federal and state courts regarding the due process limitations on the ability of a court in a plaintiff's home state to assert long-arm jurisdiction over a nonresident defendant to adjudicate an intentional tort claim arising from the defendant's defamatory postings on the Internet. In doing so, Roberts is presumably hoping to invoke the applicability of Subsection (b) of Rule 10, which provides that certiorari may be warranted when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals[.]" In Roberts's estimation, there is a "deep and long-standing conflict" in the federal and state appellate courts regarding the proper standard for deciding jurisdictional questions in these types of cases. Pet. 2.

KRE submits, however, that the perceived conflict is a mirage. The appellate court in each of the cases cited by Roberts endeavored to apply settled principles of Fourteenth Amendment law to the peculiar facts presented by the appellate record. None of the cited cases represents a break or departure from controlling precedent of this Court. *See e.g. Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 64, 751 A.2d 538, 553 (2000) ("Rather than to attempt to create a new order of jurisdictional analysis adapted to the Internet, we prefer in this case to adhere to the basics."); *Tamburo v. Dworkin*, 601 F.3d 693, 703, n. 7 (7th Cir. 2010) ("we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* [*v. Jones*, 465 U.S. 783 (1984)] speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there

can be applied to cases involving tortious conduct committed over the Internet.")

In the final analysis, the decisions rendered in the cases cited by Roberts were the result of the distinctive set of facts presented in each. Roberts has simply not presented a credible argument in support of his claim that a split of authority exists regarding the applicable legal standard or that the ruling below represents an aberration from this Court's Fourteenth Amendment jurisprudence, sufficient to grant his writ of certiorari.

A. THE OHIO SUPREME COURT APPLIED PROPERLY-STATED RULES OF LAW FROM THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE IN HOLDING THAT AN OHIO TRIAL COURT MAY, CONSISTENT WITH PRINCIPLES OF FEDERAL DUE PROCESS, ASSERT LONG-ARM JURISDICTION OVER PETITIONER TO ADJUDICATE RESPONDENT'S INTENTIONAL TORT CLAIMS ARISING FROM PETITIONER'S DEFAMATORY POSTINGS ON THE INTERNET.

The Ohio Supreme Court cited this Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984) as authority for the principle that the forum state may assert long-arm jurisdiction over an out-of-state defendant to adjudicate an in-state plaintiff's defamation claim, provided the plaintiff makes a sufficient *prima facie* showing that the defendant "expressly aimed" his tortious activity at the forum state. App. 17a. In *Calder*, Hollywood actress Shirley Jones filed a lawsuit

in a California state court against the National Enquirer magazine, its editor, and one of its reporters, based on an allegedly libelous article published in that magazine. The article accused Jones of failing to meet her professional obligations due to her heavy drinking.

The magazine did not dispute the jurisdiction of the California court. In contrast, its editor and reporter, residents of Florida, argued that requiring them to defend the lawsuit in California would violate their rights under the First and Fourteenth Amendments. This Court rejected their constitutional challenge, noting that "petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious actions were *expressly aimed* at California." *Id.* at 789 (emphasis supplied).

The *Calder* Court held that an inference of "express aiming" was supported by the following facts:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.

Id. at 790 (footnote and internal citations omitted). The Court concluded that under this scenario, "[a]n

individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." *Id.*

The Ohio Supreme Court believed the jurisdictional issue before it was analogous to the one before the Court in *Calder*. It explained:

> To rephrase the court's conclusion in *Calder* in a question, should a company injured in Ohio need to go to Virginia to seek redress from a person who, though remaining in Virginia, knowingly caused injury in Ohio? Like the defendants in *Calder*, Roberts is not alleged to have engaged in untargeted negligence. Roberts's Internet commentary reveals a blatant intent to harm KRE's reputation. Roberts knew that KRE was an Ohio company. Roberts impugned the activities that KRE undertakes in Ohio. Roberts hoped that his commentary would have a devastating effect on KRE and that if there were fallout from his comments, the brunt of the harm would be suffered in Ohio.

App. 18a.

Roberts complains "the Ohio court held that the mere foreseeability of adverse effects in Ohio does not allow Ohio to exercise jurisdiction over a nonresident whose actions produced those effects." Pet. 24. His complaint is fallacious and without merit. The Ohio Supreme Court explicitly disabused Roberts of the notion that Ohio's assertion of jurisdiction rested on "mere foreseeability":

Roberts argues that mere foreseeability by a nonresident defendant of the effects in the forum state is insufficient to justify the exercise of personal jurisdiction. Roberts's reliance on this conclusion is inapposite because the effects of his conduct went well beyond foreseeability: Roberts *intended* the effects of his conduct to be felt in Ohio. His statements were communicated with the very purpose of having their consequences felt by KRE in Ohio. The contention that his statements were not made with the purpose of injuring some person in Ohio is unavailing. The postings themselves indicate his purpose of injuring Kauffman. For example, on his October 18, 2006, posting, Roberts stated: "What I loose [sic] in dollars I will make up in entertainment at their expence [sic]." On October 19, 2006, he wrote: "Again, this is not to get a resolution. I have a much bigger and dastardly plan than that and this is a good place to start." Many of the postings name Kauffman directly and specifically mention Ohio.

Here, Roberts not only knew that Ohio resident KRE could be the victim, he intended that it be the victim. The allegedly defamatory communications concerned KRE's activities in Ohio. We are not dealing with a situation in which jurisdiction is premised on a single, isolated transaction. The posts detailed the transactions between Roberts and KRE. Moreover, the purchase of the engine block and subsequent transfers from Virginia to Ohio and back again served as the foundation from which this dispute arose. Roberts's allegedly

> defamatory posts were predicated on his course of dealing with an Ohio resident corporation. At least five Ohio residents other than Kauffman read these postings. Finally, although KRE does business nationwide, its business reputation is centered in Ohio, because Ohio is the location of its sole base of operations. Roberts knew, and in fact intended, that the brunt of the harm caused be felt by KRE in Ohio. Thus, the focal point of the damage was Ohio, and Roberts's actions therefore fulfill the requirement of causing a consequence in Ohio. Here, KRE has made a prima facie showing that Roberts purposefully availed himself of Ohio law. When viewed in a light most favorable to KRE, the evidence shows that Roberts intentionally and tortiously sought to harm KRE's reputation and negatively affect its contracts and business relationships. . . .

App. 22a-23a.

The Ohio Supreme Court also underscored that "express aiming" under *Calder* was not the only factor supporting personal jurisdiction. It cited this Court's opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) as authority for the principle that before the forum state may assert long-arm jurisdiction over a nonresident for causing injury in that state, the claim must arise out of actions "by the defendant himself that create a 'substantial connection' with the forum State." *Id.*, quoting *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957).

Regarding the existence of a "substantial connection" between Roberts and Ohio, the Court

stated "KRE has made a prima facie showing that the cause of action arose from Roberts's contacts with Ohio. Not only does the cause of action arise from defamatory statements, those statements themselves are predicated on the business dealings between Roberts and KRE. The catalyst for Roberts's actions was his Ohio contacts. In fact, but for his contacts with Ohio, Roberts's allegedly defamatory statements would not have been posted." App. 24a-25a.

In sum, the Ohio Supreme Court correctly identified and stated the controlling legal principles from this Court's jurisprudence regarding the extent to which a forum state may assert long-arm jurisdiction over a nonresident to adjudicate an intentional tort claim for injuries suffered by one of its residents. The court properly applied these correctly-stated principles to the facts presented. The appellate record simply does not support Roberts's thesis that the Ohio Supreme Court premised its jurisdictional ruling exclusively on his knowledge of KRE's state of domicile or the "mere foreseeability" his misconduct would have consequences in Ohio.

B. THE PETITION FAILS TO DEMONSTRATE A CONFLICT BETWEEN THE DECISION OF THE OHIO SUPREME COURT AND THE CITED FEDERAL AND STATE APPELLATE DECISIONS REGARDING THE APPLICATION OF THESE PROPERLY-STATED RULES OF LAW TO INTENTIONAL TORT CLAIMS ARISING FROM USE OF THE INTERNET.

Roberts suggests that appellate cases from other jurisdictions can be divided into two groups. He characterizes the first group as applying a "knowledge-plus" standard. Under this view, a defendant's awareness of the state of plaintiff's residency is an insufficient basis for the assertion of long-arm jurisdiction. The plaintiff must produce additional facts connecting the defendant to the forum state. Roberts identifies decisions from the Fourth, Fifth and Eighth Circuits and the Minnesota Supreme Court as comprising the "knowledge-plus" group.[1] Pet. 11-14.

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[1] He also claims the federal Third Circuit belongs in this camp. His citation to *IMO Indus. v. Kierkert,* 155 F.3d 254 (3d Cir. 1998) and *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003) is, however, both puzzling and unpersuasive.

IMO Indus. did not involve an intentional tort claim arising from the use of the Internet. It was a lawsuit for business interference relating to the plaintiff's efforts to sell an Italian subsidiary to a potential French suitor. The court of appeals affirmed the dismissal of the German defendant because "the focus of the dispute--i.e. the proposed sale of an Italian company to a French company and a claim of rights by a German company pursuant to a license agreement apparently governed by German law--and the alleged contacts by Kiekert (i.e., its correspondence) all appear to be focused outside the forum." *Id.* at 256.

Toys "R" Us, Inc. involved a discovery dispute. The appellate court expressed serious doubt that the defendant, a Spanish corporation, could be sued in a New Jersey federal district court for unfair competition relating to its marketing of merchandise on two company websites. The court noted that "Step Two's web sites are entirely in Spanish; prices for its merchandise are in pesetas or Euros, and merchandise can be shipped only to addresses within Spain. Most important, none of the portions of Step Two's

Roberts claims a second group of cases permits the forum state to exercise long-arm jurisdiction solely on the basis of defendant's knowledge of the plaintiff's state of residence. He contends the decision of the Ohio Supreme Court in his case, along with decisions of the Seventh Circuit and the New Jersey Supreme Court, comprise this exclusive group. He expresses deep concerns that this "erroneous standard" will force the unwary individual to defend himself in a "distant court" merely for posting an unflattering critique of a product on an Internet chat room or bulletin board. This "expansive rule," proclaims Roberts, contravenes this Court's precedents and, "if permitted to stand," will chill the free flow of "individual expression." Pet. 2.

The asseveration that judicial rulings on this subject can be neatly pigeonholed in this manner is both fanciful and simplistic. Not only are there no legitimate conflicts, notwithstanding Roberts's assertion to the contrary, the Ohio Supreme Court's analysis is consonant with the approach taken in the "knowledge-plus" decisions.

The absence of any proof the defendant knew the location of the plaintiff's residence explains the result reached by the Fifth Circuit Court of Appeals in *Revell v. Lidov,* 317 F.3d 467 (5th Cir. 2002). In that case, the plaintiff filed a defamation suit in federal district court in his home state of Texas, against defendant Lidov, a

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web sites are designed to accommodate addresses within the United States." *Id.* at 454. Despite its skepticism, the Third Circuit remanded the case to the district court to allow the plaintiff to undertake "jurisdictional discovery." *Id.* at 458.

resident of Massachusetts, for posting a critical article on a university school of journalism website. Lidov filed an affidavit, "uncontroverted by the record, stat[ing] that he did not even know that Revell was a resident of Texas when he posted his article." The court of appeals held that *Calder* requires "[a] more direct aim . . . than we have here." *Id.* at 476.

The absence of proof of "express aiming" explains the results reached by the Fourth Circuit Court of Appeals in *Young v. New Haven Advocate,* 315 F.3d 256 (4th Cir. 2002), and the Minnesota Supreme Court in *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002). In *Goldhaber v. Kohlenberg*, 395 N.J. Super. 380, 387-388, 928 A.2d 948, 953 (2007), the New Jersey Appellate Division pointed out that *Griffis* and *Young* involved "the mere posting of messages upon such an open forum by a resident of one state that could be read in a second state. . . Those courts that have declined to find jurisdiction upon the basis of mere posting of messages upon an open on-line forum have done so either on the basis that there was insufficient evidence that the alleged tortfeasor had directed or focused the defamatory comments to the forum state or on the basis that the site in question was passive, as opposed to active or interactive." The *Goldhaber* court ruled that New Jersey could exercise long-arm jurisdiction over the defendant because "as opposed to the cases cited earlier, there is, in our judgment, evidence that the author of these messages did, indeed, target them to New Jersey." *Id.*, 395 N.J. Super. at 389, 928 A.2d at 953.

Admittedly, in some cases the jurisdictional question is more nuanced. In *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), the plaintiffs filed suit in

Missouri against defendant Heineman, a resident of Colorado, for posting a message on an Internet chat board accusing them of operating a "kitten mill" in Missouri where "they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats." The Eighth Circuit Court of Appeals stated "we . . . construe the *Calder* effects test narrowly, and hold that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction. . . . [T]here are no additional contacts between Heineman and Missouri to justify conferring personal jurisdiction." *Id.* at 797 (internal citation omitted).

Roberts's case is clearly distinguishable from *Johnson* because the relationship between his defamatory Internet postings and his prior transactional history with KRE in Ohio provided the "plus" factor (in addition to knowledge), justifying the assertion of long-arm jurisdiction. The Ohio Supreme Court found that "Roberts's allegedly defamatory posts were predicated on his course of dealing with an Ohio resident corporation." App. 23a. This course of dealing, said the court, satisfied the "substantial connection" requirement of this Court's opinion in *Burger King*. *Id.* 24a-25a.

II. THE PETITION SHOULD BE DENIED BECAUSE IT PRESENTS NOTHING BEYOND AN UNSUBSTANTIATED CLAIM THAT THE OHIO SUPREME COURT RELIED ON ERRONEOUS FACTUAL FINDINGS OR MISAPPLIED A PROPERLY STATED RULE OF LAW.

Rule 10 admonishes the petitioning party that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This Court has held that certiorari is inappropriate when the dispute involves not a question of law, but rather a factual matter that is "of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Roberts contends the Ohio Supreme Court based its decision solely on two facts: "that petitioner posted comments to an Internet website with the intent to make others aware of what were – in Roberts's estimation – unreasonable business practices by the respondent . . . and that petitioner knew that respondent was based in Ohio . . ." Pet. 24. Roberts's contention is misleading at best since he conveniently overlooks or ignores other facts in the record supporting the court's decision.

These facts include: Roberts's extended course of dealing with KRE in Ohio; the relationship between the Internet postings and the prior course of dealings between the parties; the express aiming of Roberts's vituperative and inflammatory postings at Ohio; his intention and goal that the effects of his conduct would be felt by KRE in Ohio; and the identification of Ohio

residents who had read the postings. App. 18a, 22a-23a.

The Ohio Supreme Court rejected Roberts's jurisdictional challenge because of all of these significant and germane facts. He had an opportunity before both the Ohio Court of Appeals and the Ohio Supreme Court to persuade those tribunals that the application of controlling principles of federal due process to the facts involved justified the dismissal of KRE's lawsuit against him in Ohio. His disappointment over the Ohio Supreme Court's final ruling may be understandable, but his emotional reaction to the decision does not provide a legal basis sufficient to warrant this Court to grant certiorari in order to revisit the facts yet again.

CONCLUSION

A careful reading of the entire opinion of the Ohio Supreme Court establishes that the court accurately and correctly applied the "knowledge-plus" standard advocated by Roberts as the legal basis for his certiorari petition. The gravamen of Roberts's dissatisfaction with the ruling below has nothing to do with the Ohio Supreme Court's identification of the controlling legal standard it applied, but rather with its application of that standard to the facts presented. The record in this case is an entirely inappropriate one for this Court to decide the abstract question articulated in Roberts's petition. For these reasons, his petition for certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent advances two arguments against certiorari. First, it contends that there is no conflict among the lower courts regarding the question presented. Second, it argues that the facts of this case do not present the question set forth in the petition.

Both of these claims are wrong. Not only is the conflict among the lower courts clear from the text of their opinions, but the conflict is reflected as well in the division among the judges on the two appellate courts below—with the majority and dissenting opinions expressly applying different legal standards grounded in the divergent approaches of the federal and state appellate courts. And the fact that the two sets of judges below reached opposite conclusions by applying different legal standards demonstrates that this case is an appropriate vehicle for resolving the conflict—the opinions below make clear that the outcome of the case turns upon the legal standard that is applied.

Respondent's erroneous contentions appear to stem from its view that "the decisions rendered in the cases cited [in the petition] were the result of the distinctive set of facts presented in each." Opp. 3. If that were true, of course, this Court would never grant review in a case involving the application of the due process "minimum contacts" standard.

In fact, this Court has granted review in cases, like this one, that raised a question regarding the application of this Court's due process precedents in a frequently recurring factual setting on which the lower courts had divided. Review is warranted here for the very same reasons.

Finally, respondent does not even attempt to dispute the very substantial importance of the issue presented, which is confirmed by the amicus brief submitted by the Center for Democracy & Technology. The Court should grant the petition to clarify the confusion that now exists with regard to this frequently-recurring question involving application of this Court's minimum contacts jurisprudence.

A. There Is A Clear, Recognized Conflict Among The Lower Courts.

Respondent contends that there is no conflict because all of the lower courts are "endeavor[ing] to apply settled principles of Fourteenth Amendment law" established in *Calder* v. *Jones*, 465 U.S. 783 (1984). Opp. 2. The fact that lower courts agree that *Calder* is the relevant decision of this Court, however, does not mean that they agree on how *Calder* applies in the context of Internet defamation actions. To the contrary, the lower courts are clearly divided as to what *Calder* requires in the Internet context.

The division among the lower courts is mirrored explicitly in the opinions of the courts below. The majorities concluded that "because Ohio is the location of [respondent's] base of operations," and because "Roberts knew * * * that the brunt of the harm caused [would] be felt by [respondent] in Ohio," the "focal point of the damage was Ohio." Pet. App. 23a; see also Pet. App. 44a ("Ohio is the focal point both of the defamation and of the harm suffered."). And that, they determined, was sufficient to permit the exercise of personal jurisdiction.

The dissenters, on the other hand, concluded that Roberts's knowledge that the harm would be felt in Ohio was not by itself sufficient. Rather, addi-

tional evidence of Roberts's targeting of Ohio was required to permit Ohio courts to assert jurisdiction: because there was "no evidence [that] Roberts targeted * * * *Ohio residents* via the bulletin board," he did not create the minimum contacts with Ohio necessary for jurisdiction. Pet. App. 47a (emphasis added). The dissent in the Ohio Supreme Court reached the same conclusion. Pet. App. 29a (stating that posting comments to general websites that "are [no] more likely to be viewed by a resident of Ohio than by a resident of any other state" does not establish minimum contacts with Ohio).

Had petitioner channeled his comments directly and primarily to an Ohio audience by posting on a website geared towards Ohio,[1] it would have been clear that petitioner was targeting *Ohio* (like the defendants in *Calder*, whose publication was significantly marketed in California), and the dissenters would have found the assertion of personal jurisdiction permissible. See Pet. App. 29a (noting that petitioner posted comments on general national websites, "none of which have any specific connection" to the forum State); Pet. App. 47a (commenting that there was "no evidence or allegation Roberts directly targeted, solicited or interacted with Ohio residents").

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[1] Geographically targeted websites exist. For example, Local.com hosts information and comments about local and state businesses. Personal jurisdiction has been upheld where, in contrast to this case, the defendant posted his comments on websites geared towards the plaintiff's locale, thereby making clear his targeting of the *forum state*. See *Zidon* v. *Pickrell*, 344 F. Supp. 2d 624, 631-632 (D.N.D. 2004).

That is the very same division reflected generally in the decisions of the federal courts of appeals and state courts. The courts applying a "knowledge-plus" standard distinguish between facts showing that the defendant intended to affect the plaintiff and those showing that the defendant engaged in conduct that targeted a particular State in addition to the plaintiff. Those courts applying a "knowledge" standard find that a reference to the plaintiff with knowledge of the plaintiff's location is sufficient. See Pet. 10-11. Respondent's attempts to explain away this clear conflict are wholly unavailing.

To begin with, beyond highlighting that the Seventh Circuit and the New Jersey Supreme Court both cite *Calder*, Opp. 2-3, respondent in no way disputes that the Seventh Circuit and New Jersey apply a knowledge standard in Internet intentional tort cases. See Pet. 14-16.

Respondent's attempts to deny the existence of the conflicting knowledge-plus standard applied by a number of lower courts are entirely unpersuasive. Thus, the Eighth Circuit held that a defendant who posted negative remarks on a national website intending to affect the plaintiff, and stated that the plaintiff was a resident of the forum State, did not "expressly aim" their conduct at the forum, because the remarks were merely "aimed at the [plaintiff] * * * [and] incidental" to the forum. *Johnson* v. *Arden*, 614 F.3d 785, 796 (8th Cir. 2010).

Respondent is simply wrong in attempting to distinguish this case by asserting that Roberts's "prior transactional history with [respondent]" makes the Eighth Circuit's standard "clearly distinguishable" from the case below. Opp. 12. Not only did the defendant in *Johnson* have an even more significant

transactional history—she had purchased sixteen cats on behalf of the plaintiff—but the defendant had also previously "provided [unpaid] administrative assistance" to the plaintiff's business. *Johnson*, 614 F.3d at 788. The Eighth Circuit's decision thus directly conflicts with the decision below: both courts confronted similar facts, but applied different legal standards and reached different results, thereby demonstrating the existence of a clear conflict among the lower courts.

Likewise, the Minnesota Supreme Court in *Griffis* expressly rejected a "knowledge" standard, stating that defendant's "intentional tortious conduct" was not sufficient to permit the assertion of jurisdiction under *Calder* "even if [defendant] knew * * * that [her] defamatory statements about [plaintiff] would affect [plaintiff] in her home state * * *." *Griffis* v. *Luban*, 646 N.W.2d 527, 536-537 (Minn. 2002). The *Griffis* standard is thus more demanding than either the Seventh Circuit's knowledge standard, *Tamburo* v. *Dworkin*, 601 F.3d 693, 706 (7th Cir. 2010) (defendants "aimed their tortious conduct at * * * Illinois" when they posted intentionally tortious material to the Internet "with the knowledge that [plaintiff] lived, worked, and would suffer the 'brunt of the injury' there"), or the New Jersey Supreme Court's standard which requires the mere electronic publication of intentionally tortious material and the "knowledge or purpose of causing harm" in the forum State. *Blakey* v. *Continental Airlines*, 751 A.2d 538, 556 (N.J. 2000).

The *Griffis* standard is also more demanding than the test applied by the majority below. Compare Pet. 23a (stating that "because Ohio is the location of [respondent's] base of operations," and because "Rob-

erts knew * * * that the brunt of the harm caused [would] be felt by [respondent] in Ohio," the "focal point of the damage was Ohio"), with *Griffis*, 646 N.W.2d at 536-537 ("[E]ven if [defendant] knew * * * that defamatory statements about [plaintiff] would affect her in her home state of Alabama, that * * * is not enough to demonstrate that Alabama was the focal point of [defendant's] tortious conduct.").

And as the dissent below recognized, see Pet. App. 30a-31a, the standard applied by the majority in this case is flatly inconsistent with the Fourth Circuit's requirement that an Internet posting must "manifest an intent to target and focus on [forum State] readers" through facts in addition to knowledge of the plaintiff's residence. *Young* v. *New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002); *cf. ESAB Group, Inc.* v. *Centricut, Inc.*, 126 F.3d 617, 625-626 (4th Cir. 1997) (non-Internet case noting difference between trying to harm a business throughout the United States, and trying to harm a business in South Carolina, and concluding only the later supports *Calder* jurisdiction).

Respondent's attempt to distinguish *Young* and *Griffis* on the grounds of an "absence of proof of 'express aiming,'" Opp. 11, begs the question—which is the sharply different standards that the lower courts are applying in determining what constitutes express aiming for purposes of due process analysis.

Next, respondent's observation that the defendant in *Revell* v. *Lidov*, 317 F.3d 467 (5th Cir. 2002) lacked knowledge of the plaintiff's residence does not change the fact that the *Revell* court articulated a standard requiring proof in addition to knowledge of the plaintiff's location. See Pet. 13.

Finally, the Third Circuit also plainly applies a knowledge-plus standard in Internet intentional tort cases. While *IMO* is indeed a non-Internet case, see Opp. 9 n.1, that decision specifically rejects a knowledge standard. See *IMO Industries, Inc.* v. *Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998); Pet. 12-13. And the Third Circuit subsequently made clear that Internet cases are subject to the *IMO* rule. See *Toys "R" Us, Inc.* v. *Step Two, S.A.*, 318 F.3d 446, 455 & n.6 (3d Cir. 2003); Pet. 13.[2] Satisfying that standard requires plaintiffs to demonstrate facts in addition to knowledge of the plaintiff's location such as (1) that a defamatory posting was "targeted at . . . anyone in [the forum State] other than [plaintiff]," or (2) that the forum State had "a unique relationship with [the posting's target]," akin to the unique relationship California has with the movie industry, which was found to be dispositive in *Calder*. *Marten* v. *Godwin*, 499 F.3d 290, 298 (3d Cir. 2007) (internal quotation marks omitted).

In sum, there can be no doubt that there is a square conflict among the lower courts, with some courts applying a knowledge-plus standard more demanding than the due process standard applied by the majority below and by the Seventh Circuit and New Jersey Supreme Court.

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[2] Indeed, district courts within the Third Circuit have applied the *IMO* standard in Internet cases for over a decade. See *Gorman* v. *Jacobs*, 597 F. Supp. 2d 541, 547 (E.D. Pa. 2009); *Barrett* v. *Catacombs Press*, 44 F. Supp. 2d 717, 730 (E.D. Pa. 1999).

B. This Case Is An Ideal Vehicle For Resolving The Question Presented.

This case provides a particularly suitable factual context for resolving the lower courts' conflicting views regarding the due process standard for personal jurisdiction in Internet intentional tort cases.

To begin with, the divided rulings by both appellate courts below—resting on the application of different legal standards by the majority and dissent in each case—demonstrate that the outcome of this case turns on which legal standard is applied. See pages 2-3, *supra*.

Respondent strives mightily to argue that the result below turns on facts unrelated to the question presented. But, as the decisions themselves make clear, the legal standard requiring only that the plaintiff show that the defendant knew where the plaintiff was located was in fact determinative of the due process inquiry.

First, respondent is wrong in suggesting, Opp. 7-8, that the court below found that petitioner's commercial transaction constituted a connection with Ohio sufficient to give rise to jurisdiction under *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). The majority simply cited *Burger King* in its overview of personal jurisdiction, Pet. App. 15a, before resting its ruling squarely on the *Calder* test. See Pet. App. 16a-23a; see also Pet. App. 30a n.1. (O'Donnell, J., dissenting).[3]

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[3] Indeed, the language from the majority opinion quoted by respondent, see Opp. 8, simply made clear that the cause of action was sufficiently related to petitioner's Ohio contacts to permit analysis as an assertion of specific jurisdiction, rather than

Second, respondent is wrong in claiming that the transaction between petitioner and respondent constituted a connection sufficient to satisfy the knowledge-plus test, and that this case accordingly does not provide a suitable vehicle for addressing the conflict among the lower courts. See Opp. 12. As an initial matter, the dissenters below—who adopted the knowledge-plus standard—plainly concluded that the transaction between the plaintiff and defendant was not determinative under the knowledge-plus test, otherwise they would have concurred in the result reached by the majority.

That conclusion is consistent with the approaches of the other courts applying the knowledge-plus test, none of which has found a transactional relationship between the plaintiff and defendant sufficient to permit the assertion of personal jurisdiction. Thus, the Eighth Circuit case that respondent attempts to distinguish involved numerous commercial transactions, but the court nonetheless found the assertion of personal jurisdiction impermissible. See *Johnson*, 614 F.3d at 795-797.

Indeed, if the existence of a transaction between plaintiff and defendant, combined with the defendant's knowledge of the plaintiff's location, were sufficient to permit personal jurisdiction under the knowledge-plus approach, numerous lower court decisions would have come out differently, because

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general, jurisdiction. See Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1067.1 (3d ed. Westlaw 2010) ("Jurisdiction under a long-arm statute is a paradigm of specific jurisdiction. * * * [W]hen the cause of action * * * does not arise from the defendant's contacts with the forum state and specific jurisdiction is unavailable, the plaintiff must attempt to invoke general jurisdiction * * *.") (footnotes omitted).

many of them arose following a transaction between the parties. See, *e.g.*, *Marten*, 499 F.3d at 293-294; *Machulsky* v. *Hall*, 210 F. Supp. 2d 531, 533 (D.N.J. 2002).

The reason the presence of a transaction is irrelevant is that the knowledge-plus standard requires proof that the defendant's statements targeted the forum State. Pet. 12-14. The fact that the postings arose after a single online purchase could not constitute a plus factor because the underlying transaction in no way indicates that the defendant posted with intent to target a particular State's audience.[4]

In addition to illustrating the conflict among the lower courts, the factual situation presented here is ideal for resolving it. Petitioner's activities fall precisely on the line that marks the division between courts applying a knowledge standard and those applying a knowledge-plus standard: While there is evidence that petitioner intended his online statements to affect respondent and also knew that respondent was based in Ohio, Pet. App. 22a-23a, there is no evidence of the additional targeting of the forum State that knowledge-plus jurisdictions require. See Pet. App. 3a (stating that petitioner's "commen-

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[4] Respondent also points out that the majority below cited the fact that five Ohioans had read Roberts's posts. Opp. 13-14. Again, that fact is irrelevant under the knowledge-plus standard because it provides no evidence regarding the targeting of the forum State. And permitting reliance on that fact would render the knowledge-plus standard the equivalent of the knowledge standard: given the ubiquity of the Internet, it always will be possible to identify a few residents of a forum State who have viewed posts on a website that in no way targeted that State.

tary appeared on the public-forum section of [auto-racing] websites"); Pet. App. 29a (O'Donnell, J., dissenting) (observing that the sites were "*general* auto-racing websites * * * none of which have any specific connection to Ohio") (emphasis added).

Granting review here will enable the Court to resolve the conflict among the lower courts and provide clear guidance regarding the requirements of due process in this frequently-recurring setting.

C. The Issue Presented Is Important to a Broad Range of Individuals and Businesses.

This Court has recognized the Internet as a "unique and wholly new medium of worldwide human communication" that enables users to "address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno* v. *ACLU*, 521 U.S. 844, 850, 853 (1997).

The unique nature of the Internet—"located in no particular geographical location but available to anyone, anywhere in the world" (*id.* at 851)—has produced a "massive increase in the number and diversity of speakers who could face litigation in distant forums." CDT Br. 7; see also Pet. 16 n.4 (citing forty-one decisions addressing due process limits on personal jurisdiction based on Internet expression).

As the Center for Democracy & Technology explains, uncertain jurisdictional standards threaten to "stifle the twenty-first century's most vibrant forum for free expression," CDT Br. 6, as well as deter the growth of Internet commerce. CDT Br. 7-10; see also David Post, *Kill* Calder *v.* Jones!, The Volokh Conspiracy, Nov. 19, 2010, http://volokh.com/2010/11/19/kill-calder-v-jones/

(commenting that Ohio's rule is "profoundly odd and misguided," and that applying *Calder* has "given the lower courts fits over the years," resulting in "a hopeless swamp of uncertainty"); Pet. 19-20 & n.8 (citing fourteen commentators lamenting the confusion among the lower courts regarding the due process standard for personal jurisdiction in cases involving Internet expression). The Court should grant review to clarify the due process standard governing personal jurisdiction in this extremely important context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SCOTT ROBERTS,

Petitioner,

v.

KAUFFMAN RACING EQUIPMENT, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION OF CENTER FOR DEMOCRACY & TECHNOLOGY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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December 9, 2010

Motion for Leave to File Amicus Brief

Pursuant to Supreme Court Rule 37.2(b), the Center for Democracy & Technology (CDT) respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner Scott Roberts. As required by Rule 37.2(a), CDT provided timely notice to counsel for Petitioner and Respondent of CDT's intent to file a brief. Petitioner consented; Respondent did not.

CDT is a non-profit public advocacy organization that promotes the public's interest in keeping the Internet open, innovative, and free. CDT works to develop practical solutions to difficult problems posed by the intersection of law and technology, as well as to build consensus among all parties invested in the Internet's future.

CDT has expertise in a range of Internet and technology policy issues, including free speech on the Internet, liability protection for online intermediaries, data privacy, digital copyright, online child safety, health privacy, government surveillance, and government openness. CDT comments on current and proposed legislation and regulations, convenes multi-stakeholder working groups, advances sound Internet policies in national and international forums, files *amicus* briefs in court cases, and represents clients in litigation. CDT staffers regularly testify in front of federal agencies, state legislatures, and both houses of the U.S. Congress, and have served on advisory committees convened by the Federal Communications Commission, the Transportation Security Administration, the National Counter-

terrorism Center, and the U.S. Departments of State, Commerce, and Health and Human Services.

This case presents an important issue of law that directly implicates the public's interest in a free and innovative Internet. An erroneous personal jurisdiction standard for intentional torts—such as the one adopted by the Ohio Supreme Court—will severely restrict the free expression and economic growth fostered by the Internet by unfairly forcing Internet users to travel across the country to defend burdensome lawsuits. With years of experience developing practical solutions to legal challenges posed by technological change, CDT can provide important information about the need to clarify and properly develop personal jurisdiction rules for the Internet age.

Accordingly, CDT requests leave to file the accompanying brief, which asks the Court to grant certiorari and clarify the standards governing personal jurisdiction in cases presenting allegations of intentional torts.

Respectfully submitted,

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Cases

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Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 Harv. J.L. & Tech. 1 (2007)..... 5

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See Amazon.com Inc., MarketWatch, http://www.marketwatch.com/investing/stock/AMZN 9

Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006)..... 3

E-Tailing Group and PowerReviews, 5 Social Shopping Trends (May 26, 2010), http://www.e-tailing.com/ content/wp-content/uploads/2010/ 06/social_ shopping_webinar.ppt 8

Joseph L. Gerken, *How Courts Use Wikipedia, 11* J. App. Prac. & Process 191 (2010)..... 6

Jim Giles, *Internet Encyclopedias Go Head to Head*, Nature News (Dec. 14, 2005), http://www.nature.com/news/2005/051212/full/438900a.html 6

Online Product Research, Pew Internet & American Life Project, (2010), http://pewinternet.org/Reports/2010/Online-Product-Research.aspx..... 5, 7, 9

Statistics, http://en.wikipedia.org/wiki/Special:Statistics 6

The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html..... 4

Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Static-Pages/Trend-Data/Online-Activites-Total.aspx 4, 5

US Web Retail Sales to Reach $249 Billion By '14—Study, Reuters, Mar. 8, 2010, http://reut.rs/dKhfyg 9

William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press — An Extended Comment on "The Anderson Solution,"* 25 Wm. & Mary L. Rev. 793 (1984) 4

Yelp.com, Content Guidelines, http://www.yelp.com/guidelines 8

YouTube.com, YouTube Fact Sheet, http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html ... 5

Jonathan Zittrain, *The Future of the Internet—And How to Stop It* (2008) 6

Interest of *Amicus Curiae*

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on keeping the Internet open, innovative, and free.[1] CDT has expertise on issues involving free speech on the Internet, liability protections for online intermediaries, data privacy, digital copyright, online child safety, government surveillance, and government openness.

This case presents an important issue of law that directly implicates CDT's areas of expertise and its role in advancing the public's interest in a free and innovative Internet. The Internet has given rise to a new era in which the majority of Americans can make their views available to a national audience, vastly increasing the importance of the Court's rules governing personal jurisdiction for intentional tort claims. An overly permissive personal jurisdiction standard for cases presenting allegations of intentional torts, such as the standard adopted in this case by the Ohio Supreme Court, harms online speech and inhibits the opportunities for innovative economic growth available online. As a source of and advocate for pragmatic approaches to novel problems posed by technological change, CDT can explain the

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person other than CDT or its counsel made a monetary contribution to its preparation or submission. In accordance with Rule 37.2(a), CDT provided timely notice to counsel for Petitioner and Respondent of CDT's intent to file a brief. Petitioner consented to the filing; Respondent did not. A motion for leave to file accompanies this brief.

importance of clarifying and properly developing personal jurisdiction rules for the Internet age.

Introduction

As Petitioner explains, lower courts are divided on how to apply *Calder* v. *Jones*, 465 U.S. 783 (1984), to allegations of intentional torts based upon the defendant's Internet activity. *See* Pet. 10–16. Some courts have held that the defendant's knowledge of the plaintiff's state of residence does not alone suffice to establish personal jurisdiction consistent with the Due Process Clause, while others have held that mere knowledge is sufficient. Yet at the same time that the courts disagree about how to apply *Calder*, the answer is becoming increasingly important. The precise formulation of the standard for determining when online activity gives rise to personal jurisdiction in a plaintiff's home state will be critical to preserving the Internet as a vibrant forum for both speech and commerce.

First, the Internet has become a central forum for free expression in which a massive number of ordinary Americans reach nationwide audiences every day. An overly permissive interpretation of *Calder*, such as the one adopted by the Ohio Supreme Court, will stifle free speech online by subjecting millions of individual speakers to burdensome, often meritless lawsuits in distant jurisdictions.

Second, an overbroad personal jurisdiction standard for cases presenting allegations of intentional torts will also harm the increasingly Internet-driven American economy. Content created by individual Internet users—from product reviews and restaurant recommendations to blog posts and home videos—drives economic growth on the Internet. The largest,

most vibrant online businesses employ user-generated content as a crucial element of their business models. Thus, a personal jurisdiction standard that subjects the individual users who create this content to onerous litigation in distant forums will hamper online innovation and slow economic growth.

As the Court has previously recognized, standards of personal jurisdiction must reflect technological reality. Accordingly, the Court should grant the petition for a writ of certiorari and clarify the standard governing personal jurisdiction in intentional tort cases.

Reasons for Granting the Petition

I. The Threat Of Litigation Against Internet Users In Distant Jurisdictions Will Stifle Internet Speech.

Overly permissive rules of personal jurisdiction—adopted by the Ohio Supreme Court and others—could have a profound effect on the speech of millions of Internet users.

When the Court decided *Calder* in 1984, only a modest number of sophisticated broadcasters and journalists, with ample access to both capital and counsel, could publish information nationwide. *See generally Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247–54 (1974); Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 29–30 (2006). It was natural for the Court in *Calder* to presume that the "effects test"—which premised personal jurisdiction on foreseeable effects in the plaintiff's jurisdiction—would apply to a relatively small number of sophisticated businesses and individuals who interacted with the

forum State. Indeed, the defendants in *Calder* were a professional reporter and a senior editor who worked for a prominent publication, *The National Enquirer*, whose controversial stories regularly sparked litigation. *See, e.g.*, William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press — An Extended Comment on "The Anderson Solution,"* 25 Wm. & Mary L. Rev. 793, 794 (1984). The *Enquirer*'s weekly circulation, which exceeded 5 million, included more than 600,000 copies to the forum State—twice as many as in any other State; the defendant reporter "frequently travel[ed]" to the forum State in his professional capacity and, for the story at issue, made multiple "phone calls to sources in [the forum State]." *Calder*, 465 U.S. at 785–86.

But by 2010, the Internet has turned widespread publication from the privilege of the few to the province of the many. Today, nearly four out of five Americans use the Internet, which permits anyone with a computer and Internet connection to make text, images, audio, and video available to others instantaneously and without regard to State boundaries. See Trend Data, Pew Internet & American Life Project, http://www.pewinternet.org/Static-Pages/Trend-Data/Online-Activites-Total.aspx (last visited Dec. 2, 2010); The CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (stating that there are 231 million Internet users in the United States).

Far from acting as mere passive recipients of news and information, average Americans now actively participate and regularly supply content of their own. Tens of millions of Americans engage in the following activities:

- *Commenting on products:* Nearly a third of American Internet users, or approximately 74 million people, report that they have posted comments about products online. *See* Online Product Research, Pew Internet & American Life Project, at 2 (2010), http://pewinternet.org/Reports/2010/Online-Product-Research.aspx (follow "Read Full Report" hyperlink).
- *Commenting on news groups or blogs:* Approximately 60 million Americans have posted comments to an online news group, website, blog, or photo site. *See* Trend Data, *supra*, at 3.
- *Creating their own journals or blogs:* Nearly fifteen percent of American Internet users, approximately 32 million individuals, have created their own online journals or blogs. *See id.*
- *Using social networking sites:* Nearly half of all Americans report using social networking sites, *see* Online Product Research, *supra*, where users publish online statements to be viewed by hundreds, thousands, or even more across the country, *see* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 Harv. J.L. & Tech. 1, 13–15 (2007).
- *Uploading video:* Online content generation extends beyond text. For instance, every minute of every day, users upload an average of 35 hours of video to YouTube. YouTube.com, YouTube Fact Sheet, http://youtube-global.blogspot.com/2010/11/great-scott-over-35-hours-of-video.html (last visited Dec. 2, 2010).

As these examples illustrate, individual Americans now communicate on a massive scale. Political, social, and artistic discourse—in other words, free

speech—now happens across State lines more than ever before. Indeed, the Internet is "the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen." *ACLU* v. *Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (Dalzell, J., concurring).

Perhaps the quintessential example of a website dependent on user-generated content is Wikipedia, a free online encyclopedia whose content is written and edited by its more than 13 million registered users, as well as by many more users who do not register. *See* Statistics, http://en.wikipedia.org/wiki/Special:Statistics (last visited Dec. 2, 2010). Since the site was created in 2001, its articles have received more than 429 million edits. *Id.* Each article is typically written by numerous individuals who make contributions of varying sizes. *See generally* Jonathan Zittrain, *The Future of the Internet—And How to Stop It* 127–48 (2008). In addition to being far more accessible than a traditional encyclopedia, studies have found that Wikipedia is just as accurate. *See* Jim Giles, *Internet Encyclopedias Go Head to Head*, Nature News, Dec. 14, 2005, http://www.nature.com/news/2005/051212/full/438900a.html. Wikipedia has also been cited in more than 400 judicial opinions. *See* Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. App. Prac. & Process 191, 191 n.2 (2010). Yet under the Ohio Supreme Court's interpretation of *Calder*, every author or editor of a Wikipedia article about a living person or a business could face litigation in the home jurisdiction of the article's subject.

In short, an overly permissive personal jurisdiction standard could stifle the twenty-first century's most vibrant forum for free expression. In addition to facing claims of defamation and intentional interfer-

ence with contracts and business relationships, Internet users who generate and post content may face suit for, among others, privacy torts or intellectual property infringement. The massive increase in the number and diversity of speakers who could face litigation in distant forums demands that the Court clarify *Calder*'s application to suits alleging intentional torts.

II. The Threat Of Litigation Against Internet Users In Distant Jurisdictions Will Stifle Internet Commerce.

The question presented in this case is also crucial to the increasingly Internet-driven American economy. Many online companies are primarily in the business of providing Internet forums for user-generated content; examples include Yelp.com, Citysearch.com, and Tripadvisor.com, where users post reviews of restaurants, hotels, retailers, professional services, and other businesses. Online companies that sell tangible products and services also provide forums for user-generated content; examples include Amazon.com, a retail website where thousands of individuals have posted product reviews, and Expedia.com, a website for booking travel which offers user-generated reviews of hotels, cruises, and other travel activities. These companies cannot succeed unless their forums thrive.

Americans also increasingly depend on the Internet in making their purchasing decisions, whether they buy online or elsewhere. In 2010, nearly 60 percent of adults reported using the Internet to research products and services. *See* Online Product Research, *supra*, at 2. On a typical day, more than one in five

adults search for product information online, an increase from fewer than one in ten in 2004. *See id.*

Even more importantly, online shoppers increasingly depend on user-generated content (in the form of customer reviews) to help them decide which products or services to buy. *See* E-Tailing Group and PowerReviews, 5 Social Shopping Trends (May 26, 2010), http://www.e-tailing.com/content/wp-content/uploads/2010/06/social_shopping_webinar.ppt (surveying over 1,000 consumers who shop online at least four times per year and spend $250 or more annually). User-generated product reviews are rated as the most important social media tool in influencing purchasing decisions. *See id.* at 22. Online consumers also rank user-generated reviews as the most important product research tool that online retailers can provide—more important than customer service information, buying guides, or expert opinions. *See id.* at 29.

Given consumer demand, online companies solicit both positive and negative product reviews from their users. For example, Amazon.com "encourage[s]" its customers to submit "favorable and unfavorable" reviews to facilitate "smart buying choices." Amazon.com General Review Creation Guidelines, http://www.amazon.com/gp/community-help/customer-reviews-guidelines (last visited Dec. 2, 2010). Similarly, Yelp.com, an online provider of customer reviews of businesses and services, solicits reviews that "offer a rich narrative, a wealth of detail, and a helpful tip or two for other consumers." Yelp.com, Content Guidelines, http://www.yelp.com/guidelines (click "Review Guidelines") (last visited Dec. 2, 2010).

As these statistics highlight, user-generated content is increasingly fueling online commerce. Inter-

net users, however, will be deterred from posting reviews and otherwise generating content if they can be haled into distant forums to litigate potentially frivolous claims.[2] And if users are deterred from generating such content, these websites will likely receive less traffic, produce fewer transactions, and ultimately generate less revenue.

The consequences of such a change could be dramatic. Online commerce increasingly drives the American economy. In 2010, more than half of Americans reported buying products such as books, music, toys, or clothing online, up from just over a third in 2000. *See* Online Product Research, *supra*, at 3. Similarly, more than half of Americans reported making travel reservations or purchasing travel services online in 2010, as opposed to less than a quarter who did so in 2000. *Id.* One recent study estimated that by 2014, online sales will account for nearly $250 billion, or 8% of total retail sales in the United States. *See US Web Retail Sales to Reach $249 Billion By '14—Study*, Reuters, Mar. 8, 2010, http://reut.rs/dKhfyg. For instance, in 2009, Amazon.com generated nearly $25 billion in operating revenue and realized a gross operating profit of nearly $6 billion; it currently boasts a market capitalization of nearly $80 billion. See Amazon.com Inc., MarketWatch, http://www.marketwatch.com/investing/stock/AMZN (click "Profile" and "Financials" tabs) (last visited Dec. 2, 2010).

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[2] Although websites that host user-generated content are generally immune from claims of defamation based on statements made by users, *see* 47 U.S.C. § 230, litigation against users will inevitably undermine the viability of sites that depend on user-generated content.

In previous cases, the Court has not hesitated to adapt personal jurisdiction doctrine to technological change affecting large parts of the American economy. For instance, in the middle of the twentieth century, the automobile rendered obsolete the physical-presence conception of personal jurisdiction embodied by *Pennoyer v. Neff*, 95 U.S. 714 (1877). As a result, the Court adapted the doctrine to reflect the more flexible standards set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 316–19 (1945). *See Shaffer v. Heitner*, 433 U.S. 186, 202–03 (1977) (explaining how the growth of the automobile induced changes to *Pennoyer*). Today, major technological and commercial changes again warrant the Court's review.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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